TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 193.

TONY ROSSI, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE [illegible] COURT OF [illegible] COUNTY, PENNSYLVANIA.

(23,747)

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& Detweiler (Inc.), Printers, Washington, D. C., August 7, 1914.

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1 In the Superior Court of Pennsylvania in and for the Fifth District.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, sct:

Among the records and proceedings of the Superior Court of Pennsylvania, in and for the Fifth District, the following may be found as a matter of file and of record at No. 17 April Term, 1913, to wit:

2 Among the records of the Court of Quarter Sessions of Lawrence County, Pennsylvania at No. 43 March Sessions, 1912, the following may be found:

March Sessions, 1912.

COMMONWEALTH
VS.
TONY ROSSI.

Indictment.

1st. Count Selling Liquor without a license.
Misdemeanor.

JOHN W. MILLER,
Prosecutor.

A true bill.
March 5th, 1912.

P. K. FIKE, *Foreman.*

March 23d, 1912, prosecutor's Bill of Costs filed.
March 19th, 1912, case called defendant Tony Rossi pleads not guilty and jury sworn.
March 20th, 1912, jury returns a verdict of guilty as indicted.

BY THE COURT.

And now, March 23d, 1912, the Court sentence the defendant Tony Rossi to pay a fine of Five Hundred and 00/00 Dollars to the Commonwealth, pay the costs of prosecution and undergo an imprisonment in the Allegheny County Work House for and during the period of Seven months to be computed from this date (March 23rd, 1912), there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with.

BY THE COURT.

3 Exhibit Commitment March 23d, 1912.
May 9th, 1912, by paper filed H. C. McClintock appears for Tony Rossi.
May 9th, 1912, bill of exceptions filed.
May 11th, 1912, bond of Tony Rossi, on appeal to Superior

Court, in the sum of One thousand and five hundred dollars filed the same approved by William E. Porter, P. J.

May 14th, 1912, Writ of Certiorari from Superior Court Returnable First Monday of June 1912, filed.

4 STATE OF PENNSYLVANIA,
County of Lawrence, ss:

[SEAL.] I, S. E. Crawford, Clerk of the Court of Quarter Sessions in and for the County and State aforesaid, do hereby certify that the foregoing is a true copy of the record, and the papers attached are the identical papers and processes in said case at said number, so full and entire as the same remain of record and on file in my office.

In witness whereof, I hereunto set my hand and the seal of the said court at New Castle, this 20th day of May, A. D. 1912.

S. E. CRAWFORD, *Clerk.*

5 COMMONWEALTH OF PENNSYLVANIA,
County of Lawrence, City of New Castle, ss:

COMMONWEALTH OF PENNSYLVANIA
versus
JAMES CHURCH, TONY ROSSI.

Before me, the subscriber, Wm. P. Morrison, Alderman, and Ex-Officio a Justice of the Peace, in and for the said City and County, personally came John W. Miller, Dep. Police who upon his oath administered according to law, deposes and says, that at Village of Hillsville, Mahoning Twp. Pennsylvania in the County of Lawrence on or about the 19th day of February A. D. 1912 and at divers other times within the past two years. That the defts, James Church and Tony Rossi, unlawfully did sell, deliver and give away vinous, spirituous, malt and brewed liquors, and admixtures thereof in the village of Hillsville, Mahoning Township, Lawrence County Pennsylvania, without having first obtained a license agreeable to law for that purpose.

Contrary to Acts of Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania. Complainant therefore prays and desires that a warrant may issue and the aforesaid defendants James Church, Tony Rossi may be arrested and held to answer this charge of "Selling Liquor without a license for so doing," and further deponent saith not.

JOHN W. MILLER,
Complainant.

March Term A. D. 1912.

Sworn to and subscribed before me this 19th day of February A. D. 1912.

WM. P. MORRISON, [L. S.]
Alderman and ex-Officio a Justice of the Peace.

Commission Expires First Monday of May, 1915.

6 COMMONWEALTH
versus
TONY ROSSI.

We, and each of us Tony Rossi, M. Lestoria do acknowledge ourselves jointly and severally indebted to the Commonwealth of Pennsylvania, in the sum of Eight Hundred dollars, lawful money of the United States of America, to be levied of our and each of our lands and tenements, goods and chattels to the use of the said Commonwealth, conditioned that the said Tony Rossi shall be and appear at the March Term of Court of Quarter Sessions for the County of Lawrence, to be held at New Castle, on the First Monday of March A. D. 1912 then and there to answer the above charge of "Selling Liquor without a License for so doing" as the same may be preferred against the said Tony Rossi and shall abide and not depart the Court without leave, and shall, in the meantime, keep the peace and be of good behavior toward all citizens of the Commonwealth, and more especially toward John W. Miller.

ANTONIO ROSSI. [L. S.]
MICHELE LESTORIA. [L. S.]

Taken and acknowledge- before me this 27th day of February A. D. 1912.

WM. P. MORRISON, [L. S.]
[SEAL.] *Alderman and ex-Officio a Justice of the Peace.*

Commission Expires First Monday of May, 1915.

7 COMMONWEALTH OF PENNSYLVANIA
versus
JAMES CHURCH, TONY ROSSI.

Charge: "Selling Liquor without a License for so Doing."

Warrant issued to W. J. Edwards, Police or next constable, February 19, 1912, on oath of John W. Miller Deputy Police.

And now, February 19, 1912, Defendant arrested and brought into office. So answers W. J. Edwards, Police. Information read to defendant, and he pleads "Not Guilty," and demands a hearing. bail taken. Subpœna issued to Commonwealth February 19, 1912. mitted to jail to await a hearing to be held on Thursday, February 22, 1912, at 1 o'clock P. M. Commitment issued to W. J. Edwards, Police on February 19, 1912. Release issued February 20, 1912. M. Lestoria enters into a recognizance with deft. in the sum of $800 for his appearance at the above mentioned hearing. Affidavit of bail taken. Subpœna issued to Commonwealth February 19, 1912. Now, February 22, 1912, at 1 o'clock P. M. Both parties appear. This case is continued by request of Thomas W. Dickey, District Attorney, until Tuesday February 27, 1912 at 3 o'clock P. M. Bail fixed at $800. M. Lestoria enters into a recognizance with deft. in the sum of $800 for his appearance at a hearing to be held on Tuesday, February 27, 1912, at 3 o'clock P. M. Now, Tuesday

Feb. 27, 1912 at 3 o'clock P. M. All parties are present. Thomas W. Dickey, District Attorney, appeared on behalf of the Commonwealth and C. H. Young for the defense. Sworn for the Commonwealth Mrs. L. C. Klein, W. J. Edwards. And now, Tuesday Feb. 27, 1912, at 4:30 o'clock P. M. after hearing the testimony
8 in the above case, the evidence being deemed sufficient the deft. was held for the March Term of Quarter Sessions Court for 1912. Bail fixed at $800. M. Lestoria enters into a recognizance with deft. in the sum of $800 for his appearance at the March Term of Quarter Sessions Court for 1912.

CITY OF NEW CASTLE,
County of Lawrence, State of Pennsylvania, ss:

I, Wm. P. Morrison, an Alderman and Ex-Officio a Justice of the peace in and for said city, certify that the above is a true transcript from my docket, and that the recognizances *was* duly taken and acknowledged before me as aforesaid.

In Witness Whereof, I have hereunto set my hand and seal, at the City of New Castle, Pa., this 28th day of February, A. D. 1912.

[SEAL.] WM. P. MORRISON, [L. S.]
Alderman and ex-Officio a Justice of the Peace.

Commission expires first Monday of May, 1915.

9 No. 43, March Term, A. D. 1912.

COMMONWEALTH OF PENNSYLVANIA
versus
JAMES CHURCH, TONY ROSSI.

Charge: "Selling Liquor without a License for so Doing."

Information Made February 19, 1912, on Oath of John W. Miller, Dep. Police.

Coram Wm. P. Morrison, Alderman Second Ward, New Castle, Pa.

Cost —.
Pros. Priv. Coun.
Deft. Coun.
Pros. found.
Filed Feb. 29 1912.

S. E. CRAWFORD,
Pro. & Clerk.

Def't found.
Officer.
443.

10 Information & 2 names..... .60
Entry ..... .50
Warrant & 2 names..... .60

Rec. for Hearing 2	1.00
Affidavit of Bail	.50
Commitment	.50
Release to Jailor	.50
Subpœna	.45
Writing Ex. of Def't	—
Hearing	.75
Continuance	.50
Oath 2	.20
Pros. Recog	—
Def't Recog	.50
Transf. and Cert	.75
Witness	—
	$7.35

W. J. Edwards' fee	.50
Mil. 20 x 6¢	1.20
Mrs. L. C. Klein fee	.50
Mil. 24 x 6¢	1.44
Interpreter	—
	$3.64

A. Marlin..... 1.00

W. J. Edwards, Police:

Executing Warrant	1.00
Mileage 20 x 6¢	1.20
Serving subpœna 2 at 756	.75
Mileage 6 x 6¢	.36
Executing Commitment	1.00
	$4.31

W. H. Van Gorder, Constable:

Release 1.00

11 In the Court of Quarter Sessions of the Poor for the County of Lawrence.

No. 43, March Session, A. D. 1912.

COUNTY OF LAWRENCE, *ss:*

The Grand Inquest of the Commonwealth of Pennsylvania, inquiring in and for the body of the County of Lawrence, upon their oaths and Solemn affirmations, respectfully, Do Present, that James Church, yeoman, and Tony Rossi, yeoman, late of the County of Lawrence, aforesaid, heretofore, to wit: On or about the Nineteenth day of February in the year of our Lord one thousand nine hundred and twelve, and at divers other times within two years last

past, in the County of Lawrence aforesaid and within the jurisdiction of this Court, with Force and Arms, &c., did, then and there, unlawfully sell and offer for sale, divers quantities of spirituous, vinous, malt and brewed liquors, and admixtures thereof, to a person and to divers persons, to be used as a beverage, without having first obtained a license so to do contrary to the form of the
12 Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

THOMAS W. DICKEY,
District Attorney for Lawrence County.

Test. Pro. Respub.
W. J. Edwards sworn.
Katie Clein sworn.
John Miller.
Sworn by me, P. K. Fike, Foreman.
March 19, 1912. Defendant pleads not guilty.
Antonio Rossi.
Eo Die Dist. Atty.
T. W. Dickey, Dist. Atty.

13 No. 43, March Sessions, A. D. 1912.

COMMONWEALTH
VS.
JAMES CHURCH, TONY ROSSI.

Indictment: Selling Liquor without a License—Misdemeanor.

Filed Mar. 6, 1912.

S. E. CRAWFORD,
Pro. & Clerk.

W. MILLER, *Prosecutor.*

A true bill.

P. K. FIKE, *Foreman.*

March 5th, 1912.

14 In the Court of Quarter Sessions of Lawrence County, Pa

No. 43, March Sessions, 1912.

COMMONWEALTH
VS.
TONY ROSSI.

Tried before Hon. Wm. E. Porter, P. J., and a Jury at New Castle, Pa., March 19, 1912.

Appearances:

For the Commonwealth, Dist. Att'y T. W. Dickey.
For Def't, Chas. H. Young and Cleveland Henry.
Mr. A. Marlin sworn to act as interpreter in the case.

KATY KLEIN, sworn for the Commonwealth, the evidence taken through interpreter Marlin.

Direct examination by Mr. DICKEY:

Q. Where do you live, Katy?
A. Carbon Quarry.
Q. Is that in Lawrence County, Pennsylvania?
A. Yes, sir.
Q. Do you know this defendant, Tony Rossi?
A. Yes, sir, I do.
Q. State whether he took any orders from you for beer and whiskey prior to February 19, 1912?
A. He did.
15 Q. Was he at your house?
A. Yes, he was.
Q. How many times?
A. As often as she need beer, sometimes once a week and sometimes twice a week.
Q. State whether or not in pursuance of that order you received beer and whiskey after giving the order?
A. I did, yes sir.
Q. And whom did you pay for the beer and whiskey?
A. I paid Mr. Rossi.
Q. The defendant?
A. Yes, sir.
Q. That was in Lawrence County, Penn'a?
A. My own house where I live in Lawrence County, Penn'a.
Q. Was that delivered in a wagon?
A. Yes, sir, delivered in a wagon.
Q. How much did you pay for the beer?
A. The last time I paid him five dollars.
Q. How much per keg was it?
A. One dollar.
Q. And how much for the whiskey per quart?
A. 75 cents.

Cross-examination by Mr. YOUNG:

Q. Where do you live?
A. Carbon Quarry.
Q. Are you married or single?
16 A. I am married.
Q. Does your husband live with you?
A. Sure.
Q. Do you keep boarders at your house?
A. Yes.

Objected to as not cross-examination and immaterial.
Objection sustained.

Q. How long have you lived there?
A. It is about three years.
Q. All the time in the same house?

A. Yes, always in the same house.
Q. Do you know where Mr. Rossi's store is there in Lowellville?
A. I do.
Q. Have you been in it?
A. I was.
Q. Did you ever order any liquors there from Mr. Rossi to be delivered at your house?
A. No, I never order any beer, I was in their store, sometimes I take it myself from the store to my home?
Q. You have bought liquor there in his store?
A. I bought it right in the store, yes.
Q. And groceries, too?
A. I bought once cabbage in his store and cheese at one time.
Q. You bought groceries there at different times did you and liquors and had them delivered at your house?
A. No, I used to take my liquor there when I was some-
17 times taking it along; I never ordered any liquor while I was in the store—he used to come for orders.
Q. You stated in your examination that Mr. Rossi took orders from you whenever you wanted liquor once or twice a week, is that true?
A. Sure.
Q. How often would Mr. Rossi come to Hillsville?
A. Mr. Rossi himself didn't come very often, but his driver come every day.
Q. How often did Mr. Rossi come to Hillsville?
A. He didn't come very often but always on payday he come to collect the money.
Q. And the only time he ever did come to Hillsville was on payday, isn't that true?
A. He used to come every month for pay day to collect and sometimes come for orders once in awhile?
Q. When did you ever give him an order for liquor?
A. I don't remember that, whenever I would need beer I would simply give the order and the drivers bring it.
Q. Do you remember at any time you ever gave Mr. Rossi an order?
A. Sure I do.
Q. What day was that?
A. Sometimes he would come pay day to collect the money and ask me if I wanted beer or whiskey, I would tell him "yes" and it would come.
Q. Well, when?
A. I know some pay days, I didn't ever take the trouble
18 to mark it down—I don't remember—it would be payday though.
Q. Mr. Rossi never came to your house unless he came there to collect money, isn't that true?
A. He came on payday and sometimes be no payday.
Q. You cannot fix any day within the past two years that Mr. Rossi took an order from you for liquor?

A. I don't know, may be Tuesday, Monday or Friday, whatever payday would be he would be there.

Q. And that is the only days he would be there?

A. He would come paydays and sometimes was no paydays.

Q. How often would he come when there was no pay?

A. I don't know if it would be Monday, Friday or Saturday—I never paid no attention to what day it would be.

Q. But you cannot fix any one day that he took an order from you?

Objected to as the witness says she cannot fix the date.

By the COURT: I think that has been covered, Mr. Young. She says she cannot fix the date.

Mr. YOUNG: I am anxious to have that answered definitely because it does not give the defendant much chance to defend unless she can fix the date when she made the purchase.

By the COURT: I realize that but the witness does not seem to be able to fix the date.

By Mr. YOUNG:

Q. What order did you give Mr. Rossi for liquors, was it for beer?

19 A. Sometimes I would order beer and sometimes I would order whiskey.

Q. How many times have you ordered from him?

A. I have been ordering as usual sometimes five cases and sometimes less and sometimes more; whenever I would want it I would order it.

Q. And you knew during this time that Mr. Rossi was in the liquor business at Lowellville?

A. Well, sure, if I wouldn't know it I wouldn't buy anything from him.

Q. When he delivered this beer did he deliver groceries also?

A. Why, I would see sometimes groceries in his wagon; he didn't bring any to me, only once he brought me some cheese.

Q. Several times you ordered groceries from him, isn't that true?

Objected to as not cross-examination.

By the COURT: The witness may answer the question.

A. I ordered once about three months ago cheese and cabbage; I never took any more groceries from him though.

Q. Are you still buying beer from Mr. Rossi?

Objected to as being subsequent to the information and as being incompetent.

By the COURT: What do you predicate on that question?

Mr. YOUNG: We have a right to inquire as to any purchase of beer that she has made of this defendant.

By the COURT: It would hardly be material if at any time after the making of the information or until the indictment was found.

20 By Mr. YOUNG:

Q. When was the last time you purchased any beer from Mr. Rossi.

A. From the last time I paid him for the beer, I didn't bought any since, since that last hearing we had, that was about a month ago now.

Q. When was that?

A. It would be a month.

Objected to as the record is the best evidence of when the hearing was. Objection sustained.

Court takes a recess until 1:30 this P. M.

Afternoon Session.

W. J. EDWARDS, sworn for the Commonwealth and examined in chief by Mr. Dickey:

Q. Mr. Edwards, you are a special constable appointed by this court in Mahoning Township this county?

A. Yes, sir.

Q. Do you know this defendant, Tony Rossi.

A. I do.

Q. Where is his place of business?

A. Lowellville, Ohio.

Q. Did he have a license there to sell liquors.

A. I presume so, he runs a saloon.

Q. And a wholesale in connection with it?

A. Yes, sir.

Q. State whether or not you know Katie Klein the last witness?

A. I do.

Q. State whether you saw the defendant there at any time on or about the 19th of February or prior thereto?

21 A. I have.

Q. What was he doing at her place, if you know?

A. Collecting on the 19th I saw him there.

Q. What did he say, if anything?

A. He told Mrs. Klem that if the police came around there to tell the police that she didn't pay him for the beer and whiskey, that she was just paying him for cabbage, potatoes and onions.

Q. State whether you saw her pay him any money at that time?

A. I did—five dollars.

Q. State whether or not you have seen this man in Hillsville frequently?

A. I have, yes, sir—I followed him.

Q. What was he doing, if you know that?

A. Well, some places I would go after he would be there why they would say they get the order for the beer and then turn around and say no, they just give orders for groceries.

Objected to what they said.

Q. Just what you heard or observed yourself?

A. Well, I have been going from house to house, I would see him going around from house to house.

Q. How frequently would you see him going from house to house?

A. Sometimes every week and sometimes I would catch him one week only I would see him I mean.

Q. State whether or not you know Jim Church?

A. I do.

Q. State if you know who he is employed by.

A. Yes, sir, I do.

22 Q. Who by?

A. Tony Rossi.

Q. The defendant?

A. Yes, sir.

Q. State whether or not you have seen him deliver beer or whiskey to any people in this county?

A. I have.

Q. On several occasions?

A. Yes, sir.

Q. State whether or not the defendant has other drivers in his employ, if you know?

A. He has two other drivers.

Q. Who are they?

A. One is his son and the other we call him Dominick, I don't know his name, he used to work for John McIntosh.

Q. How is this liquor delivered?

A. Wagons.

Q. How is it brought over there.

A. Sometimes with horse and mule and sometimes with two horses.

Q. From where?

A. Lowellville, Ohio.

Q. Delivered in a wagon across the line?

A. Yes, sir.

Q. And you saw this man at this woman's house on one or two occasions?

A. One occasion; that is I was only in the house once—I have seen him there different times though.

Q. In the house you saw him on the 16th of February.

23 A. On the 19th, we were in the house together on the 19th.

Cross-examination by Mr. YOUNG:

Q. That was the day he was arrested wasn't it?

A. Yes, sir.

Q. Why didn't you arrest him there?

Objected to as immaterial.

Offered for the purpose of testing the credibility of the witness.

By the COURT: We will hear it for that purpose.

Question read witness.

A. Well, the reason I didn't arrest him then, I asked permission

of this lady to be in that room and if she did I wouldn't arrest him right at her house, I would wait until he got away a little ways.

Q. Did you arrest him, after he got away a little ways?

A. No, sir, I didn't catch him, he got over the line.

Q. He didn't know that you were in there did he?

A. No, I don't think he did—in the house?

Q. Yes?

A. Oh, no.

Q. Why did he run away from you then?

A. Why, his son was down at the lower end, and I had a team down there and his son come and told him to look out he had better go the police was around.

Q. How near were you when the son told him that?

A. About six feet.

Q. You heard him saying that?

A. I heard him talk Italian.

24 Q. Why do you say he said that and you didn't know what he told him?

A. A lady told me.

Q. Then you are testifying in court here to something told you?

A. It must have been something similar to that because——

Q. Is that right, it was something told you by some one else?

A. The son drove up and drove around to let Tony out at the top of the hill and the son drove down in a little surry like and pretty soon he come back and he was in a big hurry and run up over the hill and he said something in Italian, I didn't know what it was—I couldn't say about that, but he got awful busy and went out.

Q. You didn't see Tony at all on that day did you?

A. I beg to differ with you.

A. At your place?

A. I did after he left the house, yes.

Q. Where?

A. Down on the railroad track.

Q. Did you arrest him there?

A. I couldn't he *he* was in Ohio there.

Q. How far is it to the Ohio State line from this house?

A. About, I don't think it would be a half mile or a quarter mile or something like that though.

Q. Now, you say you had made arrangements with this woman to leave you into the house?

A. Yes, sir.

Q. And you heard him have a conversation with her with reference to what she was to tell the police?

A. Yes, sir.

25 Q. She cannot speak English can she?

A. Yes, sir, she can speak English.

Q. Can she understand anything that is said to her in English?

The COURT: I suppose he would not know that.

Mr. YOUNG:

Q. Did he talk in English or Italian?
A. English—she didn't talk Italian?
Q. She didn't?
A. No, sir, she is an Austrian.
Q. Did you order any beer for this woman?
A. I told her to order a case.
Q. You told her to order it?
A. Yes.
Q. Who from?
A. Jim Church.
Q. Did you order any yourself?
A. No, sir, I couldn't do that.
Q. Since the hearing in this case have you?
A. No, sir.
Q. Didn't you order some beer from John Sylvester since the hearing for this woman?

Objected to as immaterial and not cross examination.
The COURT: It is hardly cross-examination.

Q. You state you saw Mr. Rossi in this house?
A. I did.
Q. Where were you?
A. In the other room.
26 Q. The door open.
A. About that much (indicating).
Q. And you were looking through the opening, were you?
A. I was.
Q. And could see him?
A. I did.
Q. And he could see you through the opening of that size couldn't he?
A. Oh, I don't know, I don't think so.
Q. Is that the only conversation you heard when you say this lady paid him the five dollars?
A. Yes, I did.
Q. Did she order any beer at this time?
A. Tony got in a hurry and didn't wait.
Q. Why was he in a hurry?
A. What his son told him.
Q. His son wasn't there to tell him though.
A. I told you his son came up and told him something in Italian and he got busy and went out.
Q. Well, that was while he was in the house?
A. Yes, sir, it was.
Q. Did his son come into the house?
A. Right to the door there.
Q. Now, Mr. Rossi you say you arrested him on the 19th?
A. I did, yes, sir.
Q. In Lawrence County, was that?
A. Right down here where the street cars stop.

Q. That was the same day, wasn't it?

27 A. On that afternoon, yes, sir.

Q. After going into Ohio he came back into this county?

A. Yes, sir.

Q. The same day?

A. Yes, sir.

Q. And you have seen him over there and saw others delivering goods on his wagons?

A. I had.

Q. How often did you see Tony in Hillsville?

A. Oh, sometimes once a week and sometimes I didn't see him for two weeks, and I have seen him over there twice a week.

Q. That is on rare occasion, but about once a month he makes a trip over there does he not?

A. He is always over there on Monday after payday, you can always catch him there.

Q. He delivers groceries among the Italians in that neighborhood?

A. Some.

Q. And when you saw him around from one house to another he is collecting from the people he delivers goods to isn't he?

A. He is collecting all right, yes, sir.

Mr. DICKEY: And from the people he delivers liquors to also?

A. Yes, sir.

28 JOHN MILLER, sworn for Commonwealth and examined in chief by Mr. Dickey:

Q. Do you know the defendant, Tony Rossi?

A. Yes, sir.

Q. Do you know where this Katy Kleim lives?

A. Yes.

Q. State whether you saw the defendant at her house on the 19th of February last?

A. I did.

Q. State whether you saw him go into the house?

A. No, I couldn't say I did, I saw him at the door.

Q. State whether you saw Mr. Edwards on that day?

A. Yes.

Q. Where was he?

A. I saw him going into the house; I went to the quarry with him and saw him going into the house.

Q. You saw Mr. Edwards going into the house and saw Rossi at the door?

A. At the door, yes, sir.

No cross-examination.

Commonwealth rests.

Tony Rossi, sworn in his own behalf and examined in chief by Mr. Young:

Q. Where do you live Tony?
A. Lowellville, Ohio.
Q. How long have you resided in Lowellville?
A. I lived in Lowellville about 15 years now.
29 Q. Are you married?
A. Yes, sir.
Q. Do you have a family there?
A. Yes.
Q. What business are you engaged in there?
A. I have a saloon and a grocery together.
Q. How long have you been engaged in that business at Lowellville?
A. About 10 years.
Q. Do you know the prosecuting witness, Katie Kleim?
A. I don't understand that.
Q. Do you know this woman who testified?
A. I know her yes.
Q. Do you know where she lives?
A. Yes, sir.
Q. State whether you ever took any orders from her for beer or whiskey or any intoxicating liquors at any time?
A. Never took orders at her place at all for nothing, because she not give me an order; she gives sometimes an order for some cabbage or something like that and the rest of the stuff she comes down to Lowellville herself buy it and give me an order in Lowellville.
Q. Do you sell any beer or take any orders for beer or whiskey at Hillsville?
A. No, sir.
Q. How do you get your orders for liquors?
A. When we get an order, anybody comes in Lowellville or telephone me or send letters, we got an order book to show, we got lots of people calls me over the telephone, and the people in the
30 saloon tell me some people call me by phone, she wants a keg of beer or a case of beer.
Q. What did you do when you received an order either by telephone or letter when they come to pay for it later?
A. Yes, some pay and some don't pay we charge the beer right there before the stuff go out.
Q. You charge it on your books?
A. Yes, sir.
Q. What do you do with references to the packages?
A. Mark up the packages put the names on and ship it back to them in his name and the place he lives and everything I send them over there.
Q. How do you deliver this beer and whiskey?
A. Well, we got my wagon and my boys and drivers ready to send it.
Q. You deliver it in your own wagons do you?
A. Yes, sir.

Q. You sell groceries over there also?
A. Yes, sir, lots of groceries.
Q. How often do you go to Hillsville yourself?
A. Not very often, once a month and sometimes two times; sometimes after 2 or 3 months may be go over two times; one time a month pay day, just on pay days.
Q. Were you at this woman's house on the 19th of February last?
A. Yes, I was there.
Q. Did you collect any money there?
A. Yes, five dollars.
Q. What was that for?
31 A. Well, some liquor and some cabbage too and some Sweitzer cheese; of course this man says it was $9.75, my account was $9.55; 9 keg of beer one bottle whiskey makes $9.75 and some cabbage and cheese?
Q. Did you state to that woman on that day that if the police officer comes to tell them it was onions, cabbage and groceries that she was paying for instead of liquor?
A. Well, she pay me five dollars on account and——
Q. Did you tell her to tell that?
A. No—no, sir; we didn't take time to stay there we go out on payday.
Q. She paid you five dollars, did she?
A. She says Can I give you five dollars and I says all right and I marked it on the book.
Q. What were you doing over at Hillsville on that day?
A. Well, I was collecting money.
Q. Did you ever take any orders at Hillsville from any one?
A. Never.

Cross-examination by Mr. DICKEY:

Q. How long had you been going over to Hillsville since you have been in the liquor business in Lowellville?
A. Along ago as pretty near 10 years.
Q. For a number of years back.
A. Yes, sir.
Q. But you never in the past two years have taken an order for any beer or whiskey or wine in Hillsville have you?
A. No, sir.
Q. Never taken one?
32 A. No, sir.
Q. You have collected for liquors over there?
A. Yes, I go and collect for it.
Q. And Jim Church is employed by you to deliver is he?
A. Yes, he works for me and my son.
Q. And Dominick.
A. Dominick or Nick we know him.
Q. They all deliver from your store do they?
A. Yes, sir.
Q. In Hillsville.

A. Yes, sir.

Q. Now, when these people in Hillsville call you on the telephone then you order liquor you make the charge on your books and it is put into the wagon and brought over and delivered to them isn't it?

A. Yes, sir.

Q. And you come over on pay day and collect the money don't you?

A. Yes, sir, but we charge it on the book before the stuff goes out right away.

Q. You don't ship it by rail, it is brought by wagon?

A. Somebody wants it by railroad we send him by railroad.

Q. Now, haven't you at times when you are collecting on pay-day, if persons wants a keg or beer you send that over with your grocery order?

A. They have to come to Lowellville, I not go to Hillsville for orders though.

Q. In Hillsville I mean?

A. No, sir, I say I send grocery stuff all right; I tell him
33 if liquor or something like that you have to come down or send me letter so as you have the letter to show.

Q. Then during all that time for 10 years back you have never taken an order for a keg of beer or a case of beer or any whiskey in Hillsville?

A. No, sir, never did.

Q. Yet, you are over there at least once a month?

A. Yes, sir.

Q. Now, you were at this woman's house on the 19th of February?

A. I was there.

Q. And got five dollars from her.

A. She give me five dollars.

Q. Why were you in such a hurry to get away on that day.

A. Because that is my collecting day; I got to go around of course we have lots of orders to send them out, somebody give me an order for groceries; some cabbage or some such thing like that.

Q. Did you deliver groceries in your wholesale wagon, and also deliver liquors in the same wagon?

A. Same wagon deliver groceries and beer.

Q. When a person orders groceries from you and they order liquor at the same time, do you bring them over in the same load if you are going to that house?

A. If they come to my place in Lowellville, somebody orders groceries and beer, we bring it all at one time.

Q. Supposing this woman, Katie Kleim, ordered groceries and you wanted to send her two kegs of beer, what would you do in that case?

Objected to.

34 Question withdrawn.

Q. You didn't make any other collection after you were in Katie's house on that day did you?

A. No, sir.

Q. What time were you in there on that day?
A. I was there about 8 or 9 o'clock, I don't remember exactly, along about 8 or 9 o'clock anyhow.
Q. Did you in a conversation with Katie Klein yesterday say to her why she didn't come down here for you for $100 instead of coming down for the policeman for nothing—did you say that?
A. Well, yesterday, me go around for money again and of course she owe me $4.10 and I says you can pay this to me now and she says "I have no money now for you." I says all right; and her sister in law called me I am to go down to New Castle the case comes up to day, and I says you are to come down and she says No and I says all right, let me go.
Q. Didn't you say to her yesterday when you saw her that she should have come down for you for $100.00 instead of coming down for the policeman for nothing?
A. No, sir, never said about $100.00.

By Mr. YOUNG:

Q. Where did that conversation with this woman take place Tony yesterday, where was that?
A. In Hillsville.
Q. Yesterday?
A. Yesterday morning, yes, sir, I just past this house and asked if she can pay me the balance and she said she not got no
35 money, pay me some *some* other time.
Q. You were collecting in Hillsville yesterday?
A. Yes, last Saturday was payday and I go there to collect.

JOHN ROSSI, sworn for defendant and examined in chief by Mr. Young:

Q. Where do you live, John?
A. Lowellville, Ohio.
Q. Are you a son of Tony Rossi's?
A. Yes.
Q. Employed by your father?
A. Yes, he is my father and I work for him.
Q. Do you know this woman who testified?
A. Yes, I know her.
Q. Do you know where Katie Kleim lives?
A. She lives up at the quarry.
Q. State whether you ever took any orders from her for liquor or whiskey?
A. No, sir, I didn't.

Objected to as immaterial.
By the COURT: It is hardly material whether this witness ever took orders in Hillsville, he is not the defendant.

36 Mr. YOUNG:

Q. Do you work some in the store?
A. I do sometimes and sometimes sell you know.

Q. State whether you delivered any beer or whiskey in Hillsville?
A. Oh, I deliver sometimes yes.
Q. How are those packages made up?
A. Wrap them up in papers and tie them with a strip and put tags on and fetch it up.
Q. What is on the tag around it?

Objected to as immaterial.
By the COURT: It seems to me, Mr. Young that is too general.

Q. Did you ever deliver any beer or whiskey or any other liquor to this Katie Kleim?
A. Yes, I did.
Q. How were those packages prepared you delivered to her?
A. The whiskey was wrapped up with papers and the beer was kept with the tags on.
Q. Where were those packages made up.
A. In Lowellville at the store.
Q. Do you know where the order was given for it?
A. She was at the house I used to take it down.

Objected to unless the particular order is specified.
By the COURT: The witness may answer the question.
Question read witness.

A. Down at the store; I found her over there in the store when I some down to take orders, and she says if I want to go can I
37 go too and *and* ride up; I says I aint got a big load I will take you up.
Q. Did she ride up with you then?
A. Not the other day, I was heavy load on the wagon you know, I couldn't take her up.
Q. Did she pay for the goods you delivered to her at the store or were they charged to her?
A. Sometimes charged and sometimes she pay for it.

Cross-examination by Mr. DICKEY:

Q. You are out on the wagon most of the time?
A. Yes.
Q. And you don't know every order this woman gave, you weren't there all the time?
A. I don't know every one.
Q. Just the one particular order you recollect was the day she wanted to ride up?
A. And some other times too, I find lots of times.
Q. And you had such a load of liquors on that day you couldn't let her ride up?
A. No, sir, I couldn't do it on that day.
Q. You work for your father do you?
A. Yes, sir, I do.

38 Mrs. TONY ROSSI, sworn and her evidence taken by use of interpreter, Mr. Conti.

Direct examination by Mr. YOUNG:

Q. Mrs. Rossi, you are the wife of the defendant?
A. Yes, I am.
Q. State whether you are about the liquor store in Lowellville and assist in clerking there?
A. Yes, sir.
Q. Do you know this witness Katie Kleim?
A. Yes.
Q. Did you ever see her in your place of business?
A. Yes, she has been many times, she took her meals and drank over there too.
Q. Did she drink at the bar?
A. Yes, sir.
Q. Did she ever order liquors to be delivered at her house while there?
A. Yes, sir, she ordered some and some she take home herself.
Q. The liquors she ordered at the different times she has been there what was done with the orders?
A. Sometimes some she carried over herself and some packages we put her name on put on the wagon and delivered over to her house.
Q. Did she always pay for it when she ordered it?
A. Sometimes she did and sometimes she didn't.
Q. What was done when she didn't pay for it?
A. Tony would go and collect it.
Q. Was there any charge made of it on your books?
A. Yes, sir.

39 By Mr. DICKEY:

Q. You serve women at your bar do you?
A. I do, help around in the grocery store and everything.
Q. You attend bar too do you?
A. No, sir.
Q. You never go with your husband on these trips to Hillsville do you?
A. I often went with him; I have a lot of friends out there when I have time to go.
Q. Were you ever in Katie Kleim's house?
A. No, sir.

THOMAS VARLEY sworn for the defendant and examined in chief by Mr. Young:

Q. Where do you live?
A. Lowellville, Ohio.
Q. How long have you resided there?
A. 27 years.
Q. What business are you engaged in?
A. Real estate and insurance business.

Q. Did you ever hold any public position there?
A. Yes, I was Mayor.
Q. Do you know Tony Rossi?
A. Yes, sir, I do.
40 Q. How long have you known him?
A. I don't know exactly how many years, it is 10 or 12 anyhow, possibly more.
Q. Do you know the people in the vicinity in which he resides?
A. Yes, sir.
Q. State whether you know his reputation in the community in which he resides for peace and good order and as a law abiding citizen ?
A. I think so.
Q. What is his reputation?
A. It is considered pretty good.
Q. Do you know his reputation in the community for truth and veracity?
A. Well, I know it in the same way I know of people in general.
Q. How is he regarded in that community as a man of truth or otherwise?
A. He is well thought of up there.

By Mr. DICKEY:

Q. You are in the insurance business?
A. Yes, sir.
Q. Mr. Rossi is a client of yours is he not?
A. I never sold him any stocks or real estate in my life or insurance.
Q. You have no business dealings with him?
A. No, sir, nothing along that line; we worked in the flour mill some years ago—I did sell him stuff then.

41 JOHN LOMAX, sworn for defendant and examined in chief by Mr. Young:

Q. Where do you live?
A. Lowellville, Ohio.
Q. How long have you lived there?
A. Oh, it is 29 years.
Q. Do you know Tony Rossi?
A. Yes, sir.
Q. How long have you known him?
A. Well, about 12 years I should judge or 13.
Q. Are you acquainted with the people in the neighborhood of where he resides?
A. Yes.
Q. In the village of Lowellville, Ohio?
A. Yes, sir.
Q. State whether you know his reputation in the community for peace and good order and obedience to law?

A. Well, yes, fair.
Q. What is it?
A. You asked if I knew it?
Q. Yes.
A. Yes, I believe I do.
Q. What is his reputation?
A. I believe his reputation is first rate as far as I know.
Q. Do you know his reputation in that community for truthfulness and veracity?
A. Well, I would consider it good.

No cross-examination.

42 JOHN FRICK, sworn for defendant and examined in chief by Mr. Young:

Q. Where do you reside?
A. Lowellville, Ohio.
Q. What is your business?
A. Grocery, flour and feed.
Q. How long have you resided there?
A. 1891.
Q. Do you know Tony Rossi?
A. Yes.
Q. How long have you known him?
A. I would judge 12 or 13 years or something like that.
Q. Do you know the people in that neighborhood?
A. Pretty well, yes, sir.
Q. State whether you know his reputation in that community for peace and good order and as a law abiding citizen?
A. Well, I consider it that he is a good citizen.

By the COURT: We will strike out the answer.

Q. First, do you know his reputation?
A. I think it is good.
Q. Answer that by Yes or No?
A. Yes.
Q. What is his reputation?
A. It is good so far as I know.
Q. Do you know his reputation for truth and veracity?
A. It is good.

No cross-examination.

43 FENTON CUNNINGHAM, sworn for defendant and examined in chief by Mr. Young:

Q. Where do you live?
A. Lowellville, Ohio.
Q. How long have you resided there?
A. About 16 years.
Q. What business are you in there?
A. Furniture and undertaking business.

Q. Do you know Mr. Rossi?
A. I do.
Q. How long have you known him?
A. I think it is about 12 years—10 or 12 years.
Q. Pretty well acquainted with the people in that community?
A. I think I know about everybody in that community.
Q. State whether you know Mr. Rossi's reputation among the people there as to peace and good order and obedience to law?
A. I think I do.
Q. What is it?
A. Always been good as far as I have heard.
Q. Do you know his reputation there for truth and veracity?
A. I think so.
Q. What is it?
A. Good.

No cross-examination.

Defendant rests.

44 KATIE KLEIM recalled in rebuttal by Mr. Dickey:

Q. Did you see Tony Rossi yesterday?
A. Yes, sir.
Q. Did he say anything to you with reference to money?
A. Yes.
Q. What did he say to you?
A. He asked me if I was going to go for Tony for $100 or going to go for a policeman for nothing?
Q. He said you go for me for $100 or go for the policeman for nothing?
A. Yes, sir.
Q. Was that with reference to this case here?
A. Yes, sir.

Cross-examination by Mr. YOUNG:

Q. Where did you see Tony yesterday?
A. He was collecting.
Q. What was it he said to you?
A. Well, he come he say you going to New Castle and I say yes, and he say you go for me for $100.00 or go for the policeman for nothing
Q. He didn't say he would give you $100 for to come here did he?
A No, not give it.
Q. He didn't tell you that?
A. No, he didn't.

By Mr. DICKEY:

Q. Tell the court and jury what Tony said with reference to the hundred dollars—tell what he said yesterday.
A. Who, me——

Q. Yes, to you.
45 A. Nothing.

Mr. DICKEY: That is all; this witness cannot understand. We expected to have Mr. Marlin here and we do not want to delay the case. That is all.

Testimony closed.

Certified from my notes of testimony as being a true and correct transcript of all the evidence in the above entitled case taken at time and place stated.

A. D. MORNES,
Official Stenographer.

46 In the Court of Quarter Sessions of Lawrence County, Pa.

No. 43, March Sessions, 1912.

COMMONWEALTH
vs.
TONY ROSSI.

Charge to Jury.

GENTLEMEN OF THE JURY: The case that you are now called upon to render a verdict is that of the Commonwealth of Pennsylvania against Tony Rossi upon an indictment wherein he is charged with selling spirituous, vinous, malt or brewed liquors without a license, and it is for you to say whether or not he be guilty or not guilty of the offense charged in this indictment.

You have heard the testimony of the witnesses in this case. It appears that on or about the 19th day of February, 1912, and at divers other times during the last two years, that this defendant has been engaged in running a licensed wholesale or retail liquor establishment at Lowellville, Ohio, and that it has been his practice to come to Hillsville, in Lawrence County, Pennsylvania frequently during that time.

It is contended here by the Commonwealth that on this 19th day of February, and at divers other times during the past two years, he has taken orders for intoxicating liquors there—spirituous, vinous malt and brewed liquors and that afterwards the liquors were delivered by him or by his agent, and after that was done he made collection for the liquors so sold and delivered. Now, it is not denied by the defendant but he says he has not been engaged in taking orders for liquors in Lawrence County—that he delivers no liquor in Lawrence County—except that for
47 which he receives an order personally at his store. Now, then, gentlemen of the jury, the question as to whether or not an order was taken for the liquor that gives rise to this prosecution comes to be a very important one in the testimony. It simply

reduces itself to the question as to whether or not this defendant took the order from Mrs. Kleim, and you have the testimony of but two witnesses to that transaction. That of Mrs. Kleim on the one side and of this defendant on the other. It is not contended by either side, as we understand it, that any other person was present at the time of the alleged conversation taking place. It is contended by the Commonwealth that Mrs. Kleim gave an order for some liquors and that these liquors were delivered at her home and she paid for them. Now, Mr. Edwards was there at one time—I believe at the time the defendant called for the payment, is my recollection of the testimony, but I am not positive as to that. You will remember the testimony of Mr. Edwards as to what he heard there, his version of it as well as the version of Mr. Rossi.

In this case, gentlemen of the jury, it makes no difference whether this defendant has a license to sell liquor or not in Ohio. We are not concerned about that question. He has no license to sell liquors in Lawrence County, Pennsylvania. A sale consists of a demand for or an offer to purchase a commodity, a delivery of that commodity and a payment for it. Those are the three elements that constitute a sale. Those three elements enter into the sale of every article whether it be sugar, tea, coffee, hay or intoxicating liquors. There is the demand or offer to purchase, second,
48 the delivery of the matter that is to be sold, and, third, the payment for it. Now, then, was there a demand or an offer to purchase the liquor made in Lawrence County, Pennsylvania? Because, gentlemen, these three items must have occurred or taken place in Lawrence County to justify a conviction. Now, then, was there a demand or offer to purchase made in Lawrence County by Mrs. Kleim? Did she ask the defendant to deliver to her certain liquors? Was there any understanding or agreement between them in Lawrence County looking to the delivery and payment for the liquor? You have the testimony of Mrs. Kleim on one side as to that and the testimony of Mr. Rossi on the other. Now, if you find that the offer to purchase was not made in Lawrence County,—that instead of being made in Lawrence County it was made at Lowellville, Ohio, then that would be one item which it takes to constitute a sale that is not present in Lawrence County, and it must have occurred in Lawrence County in order to make it an offense under the statute. So you will look at this testimony carefully, gentlemen, as to whether or not there was a demand made in this County and whether or not Mrs. Kleim requested this defendant to deliver her liquors at her home in Hillsville.

Then you come to the second question, whether or not there was a delivery of the liquors. The defendant in this case does not deny but what he has delivered liquors in Hillsville, Pennsylvania, neither does he deny that he has received payment for the liquors within the last two years at Hillsville. And so far as to those two elements that enter into the making of a sale is concerned there is no dispute, but the real dispute comes as to whether or not the first
49 item or element I have mentioned,—that is the offer or request for liquor was made to the defendant in Lawrence County by this prosecuting witness, Mrs. Kleim.

In this as in all criminal cases, the burden is upon the Commonwealth to satisfy the jury, beyond a reasonable doubt, of the guilt of the accused before the jury would be justified in returning a verdict of guilty. But when we say a reasonable doubt we do not mean a doubt that would be searched for or hunted after in the evidence, but one that fairly presents itself. A reasonable doubt, gentlemen, is a conscientious difficulty in believing in the guilt of the accused. The offence charged in this indictment is a misdemeanor and if the jury should be of the opinion, after carefully canvassing the testimony, that the def-ndant is not guilty, then you would have the further duty to perform of making a disposition of the costs. You can place the costs upon the County, the prosecutor or the defendant, or you could divide the costs between the prosecutor and the defendant. If you should place the costs or any part of the costs upon the prosecutor you should name the prosecutor. If you should place the costs upon the county you should name the county. If you should divide the costs between the prosecutor and the defendant you should state in your verdict what proportion of the costs each is to pay. But this question of costs you come to only in the event that you find the defendant not guilty. If you find him guilty you need not make any disposition of the costs, for in that event the costs follow your finding.

This proceeding is had, gentlemen, under the act of assembly which provides: "That if any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous,
50 malt or brewed liquor, or any admixture thereof without a license shall be sentenced," &c. So that the act of assembly is plain on its face, and the question that you are to answer is, Did the defendant make a sale of liquor in Lawrence County at the time alleged or within two years prior thereto? If you are satisfied under the evidence beyond a reasonable doubt, that he did, then it is your duty to return a verdict of guilty. If you are not so satisfied, beyond a reasonable doubt, it is your duty to acquit him.

Counsel for the defendant requests us to instruct you:

1. The law presumes that the defendant is innocent and the burden of proving his guilt rests upon the Commonwealth, and unless the jury is satisfied, beyond a reasonable doubt, that the defendant is guilty of the offense charged in the indictment the verdict should be not guilty.

Ans. Affirmed.

2. The defendant having a license to sell liquor in the village of Lowellville, Mahoning County, Ohio, may legally sell liquor to any one who is not a minor, a man of known temperate habits or one visibly affected from the use of liquor without regard to their place of residence, provided that the sale takes place at his place of business in the village of Lowellville.

Ans. Affirmed. That is, gentlemen of the jury, if the defendant here is a legalized liquor dealer in Lowellville, Ohio, he has a right to sell liquor to any person fit to purchase liquor at his place of business. But the fact that he has a license to sell liquor at
51 Lowellville, Ohio, gives him no right to make a sale in Pennsylvania.

3. If the jury should find that the defendant sold and delivered vinous, spirituous, malt or brewed liquors to the prosecuting witness, who resides at Hillsville, Lawrence County, Pennsylvania, but that said sale and delivery was made in the usual course of business by an order received at the defendant's place of business in Lowellville, Ohio, and that the liquors were set aside to the purchaser in the defendant's place of business and charged to the purchaser and afterwards delivered, whether by the defendant's own delivery wagon or by common carrier, and whether paid for at the time of the delivery or afterwards, the sale would take place at the place of business of the defendant in Lowellville, Ohio, and the verdict should be not guilty.

Ans. Affirmed. That is, gentlemen of the jury, if the order was placed with the defendant in his place of business at Lowellville, Ohio, and the goods set apart for delivery to the prosecuting witness in this case at his place of business in the Borough of Lowellville, Ohio, then the defendant would not be guilty of making a sale in this county.

4. As between vendor and vendee the passing of the title by the sale of chattels depends upon the intention of the parties to be derived from the contract, and the circumstances of actual delivery and setting aside are only circumstances from which the intention may be inferred.

Ans. Affirmed.

5. As between vendor and vendee the giving of credit is as effective in passing a title as the payment of money when the
52 order is given.

Ans. Affirmed. On that point perhaps I should explain it a little further. A moment ago I said the three essential elements of a sale are, first, an offer to purchase or a demand for the commodity; second, a delivery of it, and, third, payment for it. Now, if instead of payment for it the vendor gives credit it is as effective in passing the title—that is, the giving of credit is as effective in passing the title as the payment of the money when the order was given. So that if there was credit given on the sale, or receiving of the order and the delivery of the goods there was credit given, that would constitute a sale as well as if the money for it had been actually paid at that time.

You will now take this case, gentlemen of the jury, review the testimony carefully and arrive at such a verdict as you believe to be justified by the evidence and by the law as we have explained it to you.

Now, March 19, 1912, comes the defendant by his attorneys, and before verdict excepts to the charge of the Court generally and especially to that part of the charge with reference to what constitutes a sale, and moves the Court to make an order directing the stenographer to write out and file the notes of testimony, charge of the court, points and answers thereto, with leave to counsel to specify additional assignments of error after notice of filing the record in the case.

Before verdict motion granted and bill of exceptions sealed as requested.

WILLIAM E. PORTER, *P. J.* [L. S.]

53 Certified from my notes of testimony taken at time and place stated as a true and correct copy of the entire proceedings in the above entitled case.

A. D. MORNES,
Official Stenographer.

The foregoing record of the proceedings upon the trial of the above cause is hereby approved and directed to be filed.

WILLIAM E. PORTER,
Trial Judge.

54 No. 43 Mch. Sess. 1912. Commonwealth vs. Tony Rossi. Testimony. A. D. Mornes, Official Stenographer, 53rd Judicial District, New Castle, Pa.

55 In the Court of Quarter Sessions of Lawrence County, Penna., of March Term, 1912.

No. 43.

COMMONWEALTH
VS.
TONY ROSSI.

Indictment: 1st Count, Selling Liquor without a License—Misdemeanor.

Verdict.

And now, to wit: March 19, 1912, we, the jurors empanelled in the above entitled case, find the defendant guilty as indicted.

N. E. RODGERS, *Foreman.*

56 No. 43 March Term 1912. Commonwealth vs. Tony Rossi. Verdict. Filed Mar. 20, 1912. S. E. Crawford, Pro. & Clerk.

57 In the Court of Quarter Sessions of Lawrence County, Pa., of March Sessions, 1912.

No. 43.

COMMONWEALTH
vs.
TONY ROSSI.

Indictment: Selling Liquors without a License.

True Bill. Mar. 5, 1912.
Mar. 19", 1912. Defendant pleads not guilty.
Tried by Jury and verdict Guilty.
Sentenced by Hon. William E. Porter, P. J.
And now, March 23", 1912, the Court sentence the Defendant Tony Rossi to pay a fine of Five Hundred and xx/100 dollars to the Commonwealth, pay the costs of prosecution, and undergo an imprisonment in the Allegheny County Work House for and during the period of seven months to be computed from this date (March 23" 1912) there to be kept, fed, clothed and treated as the law directs, and stand committed until the sentence be complied with.

BY THE COURT.

58 No. 43 March Sessions 1912. Commonwealth vs. Tony Rossi. Sentence. Filed Mar. 23 1912. S. E. Crawford, Pro. & Clerk.

59 In the Court of Quarter Sessions of Lawrence County, Pennsylvania.

No. 43, March Sessions, 1912.

COMMONWEALTH
versus
TONY ROSSI.

Please enter my appearance for the defendant in the above entitled case.
May 8th, 1912.

H. C. McCLINTOCK,
Attorney for Defendant.

To S. E. Crawford, Prothonotary.

60 No. 43 March Sessions 1912. Commonwealth vs. Tony Rossi. Appearance. Filed May 9, 1912. S. E. Crawford, Pro. & Clerk.

61 In the Court of Quarter Sessions of Lawrence County, Pennsylvania.

No. 43, March Sessions, 1912.

COMMONWEALTH
VS.
TONY ROSSI.

Bill of Exceptions.

And now, to wit, this 8th day of May, 1912, comes the defendant in the above entitled case and files the following bill of exceptions in pursuance of leave of court granted to counsel for defendant on March 19th, 1912, to file additional assignments of error, after notice of filing of record in the case:

(1) Defendant excepts to that portion of the Court's charge to the jury which reads as follows:

"You have heard the testimony of the witnesses in this case. It appears that on or about the 19th day of February, 1912, and at divers other times during the last two years, that this defendant has been engaged in running a licensed wholesale or retail liquor establishment at Lowellville, Ohio, and that it has been his practice to come to Hillsville in Lawrence County, Pennsylvania, frequently during that time.

"It is contended here by the Commonwealth that on this
62 19th day of February, and at divers other times during the past two years, he has taken orders for intoxicating liquors there—spirituous, vinous malt and brewed liquors and that afterwards the liquors were delivered by him or by his agent, and after that was done he made collections for the liquors so sold and delivered. Now, it is not denied by the defendant but he says he has not been engaged in taking orders for liquors in Lawrence County—that he delivered no liquor in Lawrence County except that for which he receives an order personally at his store. Now, then, gentlemen of the jury, the question as to whether or not an order was taken for the liquor that gives rise to this prosecution comes to be a very important one in the testimony. It simply reduces itself to the question as to whether or not this defendant took the order from Mrs. Kleim and you have the testimony of but two witnesses to that transaction."

The reason assigned for this exception is that this language, in effect, instructs the jury that the solicitation of orders in Lawrence County by parties not licensed by the courts of that county for liquor which is subsequently shipped from Ohio and delivered to the person giving said order in Lawrence County constitutes a sale of liquor in Lawrence County in violation of the laws of the State of Pennsylvania and ignores the fact that such a shipment and sale of liquor would constitute a transaction of interstate commerce to which the laws of Pennsylvania could not apply.

(2) Defendant excepts to that portion of the Court's charge to the jury which reads as follows:

"In this case, gentlemen of the jury, it makes no differ-
63 ence whether this defendant has a license to sell liquor or not in Ohio. We are not concerned about that question. He has no license to sell liquors in Lawrence County, Pennsylvania. A sale consists of a demand for or an offer to purchase a commodity, a delivery of that commodity and a payment for it. These are the three elements that constitute a sale. Those three elements enter into the sale of every article, whether it be sugar, tea, coffe, hay or intoxicating liquors. There is the demand or offer to purchase, second the delivery of the matter that is to be sold, and, third, the payment for it. Now, then was there a demand or an offer to purchase the liquor made in Lawrence County, Pennsylvania? Because, gentlemen, these three items must have occurred or taken place in Lawrence County to justify a conviction. Now, then, was there a demand or offer to purchase made in Lawrence County by Mrs. Kleim? Did she ask the defendant to deliver to her certain liquors? Was there any understanding or agreement between them in Lawrence County looking to the delivery and payment for the liquor? You have the testimony of Mrs. Kleim on one side as to that and the testimony of Mr. Rossi on the other. Now, if you find that the offer to purchase was not made in Lawrence County,—that instead of being made in Lawrence County it was made at Lowellville, Ohio, then that would be one item which it takes to constitute a sale that is not present in Lawrence County, and it must have occurred in Lawrence County in order to make it an offense under the statute. So you will look at this testimony carefully, gentlemen, as to whether or not there was a demand made in this county and whether or not Mrs. Kleim requested this defendant to deliver her liquors at her home in Hillsville."

Same reason assigned as in (1)

64 (3) Defendant excepts to that portion of the Court's charge to the jury which reads as follows:

"But the real dispute comes as to whether or not the first item or element I have mentioned,—that is, the offer or request for liquor, was made to the defendant in Lawrence County by this prosecuting witness, Mrs. Kleim?"

Same reason assigned as in (1)

(4) Defendant excepts to that portion of the Court's charge to the jury which reads as follows:

"This proceeding is had, gentlemen, under the act of assembly which provides:

'That if any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquor, or any admixture thereof without a license shall be sentenced,' &c.

So that the act of assembly is plain on its face, and the question that you are to answer is, Did the defendant make a sale of liquor in Lawrence County at the time alleged or within two years prior thereto? If you are satisfied under the evidence, beyond a reasonable doubt, that he did, then it is your duty to return a verdict of guilty."

Same reason assigned as in (1).

(5) Defendant excepts to that portion of the answer given by the court in modifying defendant's 5th request for instructions to the jury which reads as follows:

"A moment ago I said the three essential elements of a sale are, first, an offer to purchase or a demand for the commodity;
65 second, a delivery of it, and third, payment for it. Now, if instead of payment for it the vendor gives credit it is as effective in passing the title—that is, the giving of credit is as effective in passing the title as the payment of the money when the order was given. So that if there was credit given on the sale or receiving of the order and the delivery of the goods there was credit given, that would constitute a sale as well as if the money for it had been actually paid at that time."

The reason assigned for this exception is that the language employed leads the jury to believe that where orders for the purchase of liquor are solicited in Lawrence County by persons not licensed by the courts of that county, the giving of credit therefor in Lawrence County is effective in passing the title on delivery of the goods to such purchasers, so as to constitute an illegal sale, contrary to the laws of Pennsylvania; and because said language ignores the fact that the deliveries in question were all made in Lawrence County, Pennsylvania, as part of a shipment of goods from Ohio in pursuance of orders previously taken, thereby constituting the transaction of interstate commerce, to which the laws of Pennsylvania cannot apply.

(6) Defendant excepts to the charge of the court as a whole for the reason that it applied certain principles of law as to the sale of liquor within the state of Pennsylivania to facts which, as the undisputed testimoney showed, constitute shipments arising out of interstate commerce in regard to which the internal laws of Pennsylvania could not apply and because said charge was, therefore, clearly erroneous.

YOUNG, McCLINTOCK & PAINTER.
H. C. McCLINTOCK.

66 No. 43, March Sessions, 1912. In the Court of Quarter Sessions of Lawrence County, Pennsylvania. Commonwealth vs. Tony Rossi. Bill of Exceptions. Filed May 9, 1912. S. E. Crawford, Pro. & Clerk. H. C. McClintock. Young, McClintock & Painter, 1508 Park Building, Pittsburgh, Pa.

67 In the Court of Quarter Sessions of Lawrence County, Pennsylvania.

No. 43, March Sessions, 1912.

COMMONWEALTH OF PENNSYLVANIA
vs.
TONY ROSSI.

Appeal of Tony Rossi from the Sentence or Judgment of said Court.

Know all men by these presents that we, Tony Rossi and M. Lestoria and Ralph Leonella, as sureties, are held and firmly bound unto the Commonwealth of Pennsylvania to the use of all parties interested in the sum of one thousand five hundred (1,500) dollars lawful money of the United States, to be paid to the said Commonwealth to the use of the party or parties entitled thereto or their certain executors, administrators or assigns, which said sum of one thousand five hundred dollars is the amount of the appeal bond fixed by the order of the Superior Court of the state of Pennsylvania and making said appeal a supersedeas, to which payment well and truly to be made and done we do bind ourselves, our heirs, executors and administrators and every of them firmly by these presents.

Sealed with our seals and dated this eighth day of May, A. D. 1912.

Whereas Tony Rossi has appealed to the Superior Court of Pennsylvania from the sentence or judgment of the court of quarter sessions of the County of Lawrence in the above stated suit or proceeding; and

68 Whereas the said Superior Court, on the 7th day of May, A. D. 1912, ordered that the appeal taken in the above entitled case should operate as a supersedeas, conditioned upon the defendant giving bail in the sum of one thousand five hundred dollars with one or more sufficient sureties to be approved by the court of quarter sessions of Lawrence County.

Now the condition of this obligation is such that if the said Tony Rossi shall not prosecute his appeal with effect but shall forthwith surrender himself in obedience to the sentence heretofore imposed and comply with such judgment or order as this court may enter or make, then this obligation to be void; otherwise to be and remain in full force and virtue.

TONY ROSSI. [SEAL.]
M. LESTORIA. [SEAL.]
RALPH LEONELLA. [SEAL.]

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

On this eighth day of May, A. D. 1912, before me, Frank McC. Painter, a Notary Public, duly commissioned and acting in and for said county and state, came the above named Tony Rossi and

acknowledged the foregoing indenture to be his act and deed, and desired the same to be recorded as such.

Witness my hand and Notarial Seal the day and year aforesaid.

[SEAL.] FRANK McC. PAINTER,
Notary Public.

My Commission expires February 21, 1915.

69 STATE OF PENNSYLVANIA,
County of Lawrence, ss:

On this 10th day of May, A. D. 1912, before me, the subscriber, a Notary Public, duly commissioned and acting in and for said county and state, came the within named Raph. Leonella and M. Lestoria and acknowledged the within instrument to be *his* act and deed, and desired the same to be recorded as such.

Witness my hand the day and year aforesaid.

[SEAL.] WILLIAM E. PORTER, *P. J.*

70 No. 43, March Sessions, 1912. In the Court of Quarter Sessions of Lawrence County, Pennsylvania. Commonwealth of Pennsylvania vs. Tony Rossi. Bond on Appeal. Now May 10, 1912, the within bond and surety approved. William E. Porter. P. J. Filed May 11, 1912. S. E. Crawford, Pro. & Clerk. Young, McClintock & Painter, 1508 Park Building, Pittsburgh, Pa.

71 *Superior Court Docket Entries.*

17.

COMMONWEALTH
vs.
TONY ROSSI, Appellant.

Appeal from Quarter Sessions Lawrence County, at No. 43 of March Sessions, 1912.

Young, McClintock & Painter.

Appeal and affidavit filed and Writ exit May 6, 1912.

May 7, 1912, Petition for order of supersedeas filed.

Eo Die, Ordered that appeal operate as a supersedeas upon defendant entering bail in the sum of $1,500, to be approved by the court of Quarter Sessions of Lawrence County (See order).

May 29, 1912, Transferred for hearing at Philadelphia under Rule VII.

October 7, 1912, Argued.

April 21, 1913, Judgment affirmed. Porter, J.

April 25, 1913, Record and assignments returned from Eastern District.

April 29, 1913, Petition for allowance of appeal filed and sent to Supreme Court.

Eo Die, Order to hold record filed.
April 30, 1913, Petition for allowance of appeal refused.
May 2, 1913, Order to hold record thirty days filed.

72 In the Superior Court of Pennsylvania, Sitting at Pittsburgh.

Court of Quarter Sessions, County of Lawrence.

No. 43, Sessions of March Term, 1912.

COMMONWEALTH
vs.
TONY ROSSI.

Enter Appeal on behalf of defendant from the judgment or sentence of the Court of Quarter Sessions of the County of Lawrence.

YOUNG, McCLINTOCK & PAINTER,
Attorneys for Appellant.

To George Pearson, Prothonotary of The Superior Court of Pennsylvania, sitting at Pittsburgh.

COUNTY OF ALLEGHENY, *ss:*

H. C. McClintock, being duly sworn, saith that the above Appeal is not intended for delay, but because Appellant believes he has suffered injustice by the judgment from which he appeals.

H. C. McCLINTOCK.

Sworn and subscribed before me this 6th day of May A. D. 1912.

GEO. PEARSON,
Prothonotary.

[Endorsed:] No. 17, April Term, 1913. Superior Court of Pennsylvania, Sitting at Pittsburgh. Commonwealth vs. Tony Rossi. Appeal and Affidavit. Filed May 6, 1912. Superior Court, Fifth District. Young, McClintock & Painter, Attorneys for Appellant, 1508 Park Bldg., Pittsburgh, Pa.

73 THE SUPERIOR COURT OF PENNSYLVANIA,
County of Allegheny, ss:

The Commonwealth of Pennsylvania to the Judges of the Court of Quarter Sessions for the County of Lawrence, Greeting:

We being willing for certain causes, to be certified of the matter of the Appeal of Tony Rossi from the judgment or sentence of your said Court, at No. 43, of March Sessions, A. D. 1912, wherein Commonwealth is Plaintiff and the said Appellant is Defendant before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Judges of our Superior Court of Pennsylvania, at a

Superior Court to be holden at Pittsburgh, the first Monday of June next, to wit, June 3 A. D. 1912 so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable Charles E. Rice, Doctor of Laws, President Judge of our said Superior Court at Pittsburgh, the sixth day of May in the year of our Lord one thousand nine hundred and twelve.

[Seal the Superior Court of Pennsylvania.]

GEORGE PEARSON,
Prothonotary.

[Endorsed:] Copy. No. 17, of April Term, 1913. Superior Court. Commonwealth vs. Tony Rossi. Appellant. Certiorari to the Court of Quarter Sessions for the County of Lawrence Returnable the first Monday of June A. D. 1912. Rule on the Appellee, to appeal and plead on the Return-day of the Writ. Geo. Pearson, Prothonotary. Note.—No application for the allowance of special supersedeas will be considered unless Rule 37 of the Superior Court is strictly complied with. Filed Oct. 7, 1912. In the Superior Court. Young, McClintock & Painter, Attorney- for Appellant. Filed May 14th, 1912.

To the Honorable the Judges of the Superior Court of the Commonwealth of Pennsylvania, sitting at Pittsburgh:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

(Signed) WILLIAM E. PORTER, *P. J.* [L. S.]
—— ——. [L. S.]

74 In the Superior Court of Pennsylvania.

No. 17, April Term, 1913.

COMMONWEALTH OF PENNSYLVANIA
vs.
TONY ROSSI, Appellant.

Appeal from the Court of Quarter Sessions for the County of Lawrence, No. 43, March Sessions, A. D. 1912.

Petition for Allowance of Special Supersedeas.

To the Honorable the Judges of said court:

The petition of Tony Rossi, defendant and appellant in the above entitled case, respectfully represents:

That said defendant has taken an appeal from the judgment or sentence of the Court of Quarter Sessions for the county of Lawrence

in the above entitled case, a certiorari to said court having been granted by the Prothonotary of your Honorable Court at the above number and term, returnable to the first Monday of June, 1912.

That appellant was tried in the court below under an indictment charging him with unlawfully selling liquor without a license, a duly certified copy of which indictment is hereto attached, said sales being therein alleged to have taken place within the county of Lawrence aforesaid; that at said trial, it was proved by the Commonwealth that appellant, on or about February 19th, 1912, and at divers times prior thereto, did sell or agree to sell to one
75 Katie Klein, at her residence in Hillsville, Lawrence County, certain beer and whiskey which were subsequently delivered to her at her said residence by appellant or his agents.

The following facts were proved or conceded by the Commonwealth:

That appellant was engaged in the business of keeping a saloon and grocery store in the village of Lowellville, Ohio, where he also resided, and was duly authorized under the laws of Ohio to dispense and sell liquors, both at wholesale and retail; that said village was in the county of Mahoning, Ohio, immediately adjoining the county of Lawrence, Pennsylvania; that said alleged sales which were complained of as having taken place in Lawrence County, Pennsylvania, in violation of the laws of this state were made in pursuance of orders previously solicited by said appellant, or his duly authorized agent, in said county of Lawrence. It was conceded by the prosecution that in every case delivery of said liquors was made to the purchaser in Lawrence County from appellant's place of business in Ohio, said liquors being shipped or carried directly from said place of business by the appellant or his agents in a wagon belonging to him. No question of the hawking or peddling of said liquors in Lawrence County was raised in this case, it being admitted by the Commonwealth that the order for said liquors was first given in Lawrence County but that said goods were shipped or carried from appellant's saloon in Ohio.

That the facts, as proved by the Commonwealth, constitute transactions of interstate commerce over which the laws of the State of Pennsylvania had no control and which, therefore, could not be a violation thereof; that the trial court erroneously instructed
76 the jury that appellant was guilty of violating state laws and selling liquors unlawfully in the county of Lawrence, as charged in the indictment if the jury found that he or his agents had taken orders for said liquors in said county and afterwards delivered them to the purchaser in pursuance thereof; that a portion of the charge and ruling of said court, of which the appellant particularly complains, is as follows:

"You have heard the testimony of the witnesses in this case. It appears that on or about the 19th day of February, 1912, and at divers other times during the last two years, that this defendant has been engaged in running a licensed wholesale or retail liquor establishment at Lowellville, Ohio, and that it has been his practice to

come to Hillsville, in Lawrence County, Pennsylvania, frequently during that time.

"It is contended here by the Commonwealth that on this 19th day of February, and at divers other times during the past two years, he has taken orders for intoxicating liquors there—spirituous, vinous, malt and brewed liquors and that afterwards the liquors were delivered by him or by his agent and after that was done he made collection for the liquors so sold and delivered. Now, it is not denied by the defendant but he says he has not been engaged in taking orders for liquors in Lawrence County—that he delivers no liquor in Lawrence County except that for which he receives an order personally at his store. Now, then, gentlemen of the jury, the question as to whether or not an order was taken for the liquor that gives rise to this prosecution comes to be a very important one in the testimony. It simply reduces itself to the question as to whether or not this defendant took the order from Mrs.
77 Kleim, and you have the testimony of but two witnesses to that transaction."

"In this case, gentlemen of the jury, it makes no difference whether this defendant has a license to sell liquor or not in Ohio. We are not concerned about that question. He has no license to sell liquors in Lawrence County, Pennsylvania. A sale consists of a demand for or an offer to purchase a commodity, a delivery of that commodity and a payment for it. These are the three elements that constitute a sale. Those three elements enter into the *said* of every article, whether it be sugar, tea, coffee, hay or intoxicating liquors. There is the demand or offer to purchase, second the delivery of the matter that is to be sold and, third, the payment for it. Now, then, was there a demand or an offer to purchase the liquor made in Lawrence County, Pennsylvania. Because, gentlemen, these three items must have occurred or taken place in Lawrence County to justify a conviction. Now, then, was there a demand or offer to purchase made in Lawrence County by Mrs. Kleim? Did she ask the defendant to deliver to her certain liquors? Was there any understanding or agreement between them in Lawrence County looking to the delivery and payment for the liquor? You have the testimony of Mrs. Kleim on one side as to that and the testimony of Mr. Rossi on the other. Now, if you find that the offer to purchase was not made in Lawrence County,—that instead of being made in Lawrence County it was made at Lowellville then that would be one item which it takes to constitute a sale that is not present in
Lawrence County, and it must have occurred in Lawrence
78 County in order to make it an offense under the statute. So you will look at this testimony carefully, gentlemen, as to whether or not there was a demand made in this county and whether or not Mrs. Kleim requested this defendant to deliver her liquors at her home in Hillsville."

That the court entirely omitted to charge the jury concerning the inapplicability of the laws of Pennsylvania to transactions of interstate commerce and that the facts as proved comprised such a transaction if the liquors were shipped or carried directly from a point

outside the state of Pennsylvania to a point within the state, even if an order for the goods so shipped or carried was previously given to the seller or his agent within the state; that appellant, by his counsel, duly excepted to the charge of the said court, generally and specially, before a verdict was taken and that a bill of exceptions was duly sealed by said court as requested. That appellant was, by reason of said instructions, wrongfully convicted, as indicted, and sentenced to pay a fine of $500 and serve for seven months in the workhouse of Allegheny County, although guilty of no crime under the laws of this state and nation.

Wherefore appellant prays your Honorable Court to grant a writ of special supersedeas which shall act as a stay of the sentence imposed by the lower court as aforesaid, said writ to be issued upon such terms and conditions as may be required by your Honorable Court.

And he will ever pray etc.

YOUNG, McCLINTOCK & PAINTER,
Attorneys for Appellant.

79 STATE OF PENNSYLVANIA,
County of Allegheny, ss:

H. C. McClintock, being duly sworn, according to law, deposes and says that he is counsel for appellant in the above entitled case and well acquainted with the facts as above set forth, which said facts are true and correct as he verily believes.

H. C. McCLINTOCK.

Sworn to and subscribed before me this 7th day of May, 1912.

FRANK McC. PAINTER,
[SEAL.] *Notary Public.*

My Commission expires February 21, 1915.

80 *Order of Court.*

And now, to wit, this seventh day of May, A. D. 1912, upon the presentation and due consideration of this petition, it is ordered that the appeal taken in the above entitled case shall operate as a supersedeas, conditioned upon the defendant entering bail in the sum of $1500. with one or more sufficient sureties to be approved by the court of quarter sessions of Lawrence County, or a Judge thereof and conditioned that if he shall not prosecute his appeal with effect he will forthwith surrender himself in obedience to the sentence heretofore imposed and will comply with such judgment or order as this court may enter or make, due notice of the time and place of entering bail to be given to the District Attorney of said county.

BY THE COURT.

81 In the Superior Court of Pennsylvania, Western District. No. 17, April Term, 1913. Commonwealth of Pennsyl-

vania vs. Tony Rossi. Petition for Allowance of Special Supersedeas. Young, McClintock & Painter, 1508 Park Building, Pittsburgh, Pa.

82 In the Superior Court of Pennsylvania, Western District.

No. 17, April Term, 1913.

COMMONWEALTH
v.
TONY ROSSI, Appellant.

Appeal by Defendant from judgment of the Court of Quarter Sessions of Lawrence County, at No. 43, March Session, 1912.

Honorable William E. Porter, Judge.

Returnable at Philadelphia.

Assignments of Error.

(1) The court erred below in charging the jury as follows:

"You have heard the testimony of the witnesses in this case. It appears that on or about the 19th day of February, 1912, and at divers other times during the last two years, that this defendant has been engaged in running a licensed wholesale or retail liquor establishment at Lowellville, Ohio, and that it has been his practice to come to Hillsville in Lawrence County, Pennsylvania, frequently during that time.

83 It is contended here by the Commonwealth that on this 19th day of February, and at divers other times during the past two years he has taken orders for intoxicating liquors there—spirituous, vinous malt and brewed liquors and that afterwards the liquors were delivered by him or his agent, and after that was done he made collection for the liquors so sold and delivered. Now, it is not denied by the defendant but he says he has not been engaged in taking orders for liquors in Lawrence County—that he delivered no liquor in Lawrence County except that for which he receives an order personally at his store. Now, then, gentlemen of the jury, the question as to whether or not an order was taken for the liquor that gives rise to this prosecution comes to be a very important one in the testimony. It simply reduces itself to the question as to whether or not this defendant took the order from Mrs. Kleim and you have the testimony of but two witnesses to that transaction."

To this portion of the charge, appellant excepted on the ground

"That this language, in effect, instructs the jury that the solicitation of orders in Lawrence County by parties not licensed by the courts of that county for liquor which is subsequently shipped from Ohio and delivered to the person giving said order in Lawrence County constitutes a sale of liquor in Lawrence County in violation of the laws of the State of Pennsylvania, and ignores the fact that

such a shipment and sale of liquor would constitute a transaction of interstate commerce to which the laws of Pennsylvania could not apply."

84 (2) That court below erred in charging the jury as follows:

"In this case, gentlemen of the jury, it makes no difference whether this defendant has a license to sell liquor or not in Ohio. We are not concerned about that question. He has no license to sell liquors in Lawrence County, Pennsylvania. A sale consists of a demand for or an offer to purchase a commodity, a delivery of that commodity and a payment for it. These are the three elements that constitute a sale. Those three elements enter into the sale of every article whether it be sugar, tea or coffee, hay or intoxicating liquors. There is the demand or offer to purchase, second the delivery of the matter that is to be sold, and, third, the payment for it. Now, then, was there a demand or an offer to purchase the liquor made in Lawrence County, Pennsylvania? Because, gentlemen, these three items must have occurred or taken place in Lawrence County to justify a conviction. Now then, was there a demand or offer to purchase made in Lawrence County by Mrs. Kleim. Did she ask the defendant to deliver to her certain liquors? Was there any understanding or agreement between them in Lawrence County looking to the delivery and payment for the liquor? You have the testimony of Mrs. Kleim on the one side as to that, and the testimony of Mr. Rossi on the other. Now, if you find that the offer to purchase was not made in Lawrence County—that instead of being made in Lawrence County it was made at Lowellville, Ohio, then that would be one item which it takes to constitute a sale that is not present in Lawrence County, and it must have occurred in Lawrence County in order to make it an offense under the statute. So you will look at this testimony carefully, gentlemen, as to whether or not there was a demand made in this county and whether or not Mrs. Kleim requested this defendant to

85 deliver her liquors at her home in Hillsville."

To this portion of the charge, appellant excepted on the same ground as that set forth in the first assignment of error.

(3) The Court below erred in charging the jury as follows:

"But the real dispute comes as to whether or not the first item or element I have mentioned,—that is, the offer or request for liquor, was made to the defendant in Lawrence County by this prosecuting witness, Mrs. Kleim."

To this portion of the charge, appellant excepted on the same ground as that set forth in the first assignment of error.

(4) The court below erred in charging the jury as follows:

"This proceeding is had, gentlemen, under the act of assembly which provides:

'That if any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquor, or any admixture thereof without a license shall be sentenced' &c.

"So that the Act of Assembly is plain on its face, and the question that you are to answer is, Did the defendant make a sale of liquor

in Lawrence County at the time alleged or within two years prior thereto? If you are satisfied under the evidence, beyond a reasonable doubt, that he did, then it is your duty to return a verdict of guilty."

To this portion of the charge, appellant excepted on the same ground as that set forth in the first assignment of error.

Respectfully submitted,

YOUNG, McCLINTOCK & PAINTER,
Attorneys for Appellant.

86 No. 17, April Term, 1913. In the Superior Court of Pennsylvania, Western District. Commonwealth vs. Tony Rossi, Appellant. Appeal by defendant from judgment of the Court of Quarter Sessions of Lawrence County at No. 43 March Session, 1912. Returnable at Philadelphia. Assignments of Error. Filed Oct. 7, 1912. In the Superior Court. Young, McClintock & Painter, 1508 Park Building, Pittsburgh.

87 In the Superior Court of Pennsylvania.

No. 17, April Term, 1913.

COMMONWEALTH
vs.
TONY ROSSI.

Appeal, Q. S., Lawrence County.

Filed April 21, 1913.

PORTER, *J.:*

The defendant was indicted and convicted, under the provisions of the act of May 13th, 1887, P. L. 113, of selling intoxicating liquors without a license, in the County of Lawrence, Pennsylvania. He admitted at the trial that he had entered into contracts for the sale of such liquors to be delivered at the residences of the purchasers, in Lawrence County, Pennsylvania, but asserted that such contracts had been made in the State of Ohio and had been executed by delivery of the liquors from his store in Ohio to the several purchasers in Pennsylvania. The evidence produced by the Commonwealth was such as to warrant a finding that defendant visited the houses of residents of Lawrence County, Pennsylvania, for the purpose of soliciting orders for liquors, and at such residences, in Pennsylvania, received and accepted orders for liquors, to be delivered by the defendant at the residences of the purchasers, in Pennsylvania. The one fact that was in dispute at the trial was whether the orders had been given by the purchasers and accepted by the defendant in Lawrence County, Pennsylvania, or at the store of the defendant, in the State of Ohio. The verdict of the jury was in favor of the Commonwealth upon this contention, and determines that the

orders for the liquors were given by the purchasers at their
88 residences, in the State of Pennsylvania, and were there accepted by the appellant. The orders thus given and accepted in Pennsylvania constituted the executory contract of sale. All the assignments of error involve the proposition that the state statute, as construed and applied by the court below, is repugnant to the commerce clause of the Constitution of the United States.

The act of May 13th, 1887, P. L. 113, entitled "An act to restrain and regulate the sale of vinous and spirituous, malt or brewed liquors or any admixture thereof" was enacted in the exercise of the police powers of the Commonwealth. As the subject dealt with is intoxicating liquors, the decision of the cause does not require us to determine whether the restraints which the statute imposes would be a direct burden on inter-state commerce if generally applied to subjects of such commerce, but only to decide whether such restraints are a direct burden on inter-state commerce in intoxicating liquors as regulated by Congress in the act commonly known as the Wilson Act, 26 Statutes at Large, 313 Chap. 728; the text of which reads as follows: "That all fermented, or distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The executory contracts for the sales of liquors involved
89 in this case, were made in the State of Pennsylvania and those contracts provided for the delivery of the liquors by the defendant at the residences of the purchases, in the State of Pennsylvania. A sale really consists of two separate and distinct elements; first, a contract of sale, which is completed when the offer is made and accepted and, second, a delivery of the property which may precede, be accompanied by, or follow the payment of the price, as may have been agreed upon between the parties. The sales in this case appear to have been made upon credit, the defendant calling at the residences of his customers, in Pennsylvania, upon the pay day following the delivery of the goods and there receiving payment. There was no controversy in the court below as to the manner in which the defendant complied with his agreement to deliver the liquors at the residences of his customers. He had a store in the State of Ohio and he there loaded the goods upon his own wagon and, either by himself or his employee, drove across the state line and delivered the goods to the purchasers at their residences in Pennsylvania, as by his contract he had undertaken to do. The contracts were made in Lawrence County, they were to be there executed, and the goods were delivered, as by contract required, in Lawrence County, Pennsylvania. These facts stamp the transactions as sales in the County of Lawrence, State of Pennsylvania; Commonwealth v. Holstein, 132 Pa. 357; Commonwealth v. Guinzburg, 46

Pa. 488; Norfolk & Western Ry. Co. v. Sims, 191 U. S. 451. Were these sales, notwithstanding the provisions of the Wilson Act, exempt from the police power of the State of Pennsylvania, because of the commerce clause of the Constitution of the United States?

90 The fact that the defendant had a license to sell liquors in the State of Ohio is immaterial to the determination of the question here presented, for his right to carry on interstate commerce, by delivering goods in Pennsylvania, could in no manner be made to depend upon his having a license from the State of Ohio. If the trade was such as to be entitled to the protection of the commerce clause of the Constitution of the United States, the residences of the parties engaged in the trade is equally immaterial. A resident of Pennsylvania who owns a factory or store in the State of Ohio has the same right to the protection of the commerce clause of the constitution, in disposing of his goods in all states other than Ohio, as that employed by a resident of Ohio. If the business carried on by this defendant was under the shield of the Constitution of the United States, then a resident of Pennsylvania could establish a warehouse in the State of Ohio and make the same sales in Pennsylvania, in the same manner, which this defendant has done, without molestation from this state. Commerce among the several states comprehends intercourse for the purpose of trade in any of its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different states. The purpose of the Wilson Act, as a regulation by Congress of interstate commerce, was to allow the states, as to intoxicating liquors, when the subject of such commerce, to exert more ample power than could have been exercised before the enactment of the statute, and to extend their authority to such liquors shipped from other states before they became commingled with the mass of other property in the state by sale in the original package. The statute was first construed

91 by the Supreme Court of the United States in Rhodes v. State of Iowa, 170 U. S. 412. The statute of Iowa considered in that case forbade the transportation of any intoxicating liquors within the state by any common carrier or agent thereof without the performance of certain conditions. The shipment to which it was attempted to apply this statute had originated in the State of Illinois, the goods having been delivered to the carrier in that state for transportation to a consignee in Iowa. It was held that the Wilson Act did not subject the intoxicating liquors to the exercise of the police powers of the state during the course of the inter-state shipment, but only after a termination of the inter-state shipment by delivery to the consignee, and before a resale by him. The distinction between the right to ship goods into the state and the right to sell them was referred to in the following language in the opinion of that case; "Whilst it is true that the right to sell, free from state interference, inter-state commerce merchandise was held in Leisy v. Hardin to be an essential incident of inter-state commerce it was yet but an incident, as the contract of sale within a state in its nature was usually subject to the control of the legislative authority of the state. On the other hand, the right to contract for the

transportation of merchandise from one state into or across another involved inter-state commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state." This case has been followed by others holding that goods while in the possession of a common carrier, under a contract for carriage arising outside of the state were not by the Wil-
92 son Act, rendered subject to state control until the termination of the inter-state shipment by delivery to the consignee; Louisville & Nashville R. R. Co. v. Cook Brewing Co., 223 U. S. 70. These cases against common carriers, transporting goods under a contract which must necessarily be governed by the laws of several states, clearly recognize the distinction between such a contract and that of a mere contract of sale. That the Wilson Act did render subject to the police regulations of a state not only contracts for the sale of liquor while still in another state, but even the solicitation of orders for such liquor, which did not even contemplate acceptance within the state, was squarely decided in Delamater v. South Dakota, 205 U. S. 93. In that case it was said: "That act, as we have seen, manifested the conviction of congress that control by the states over the traffic of dealing with liquor within their borders was of such importance that it was wise to adopt a special regulation of inter-state commerce on the subject. When, then, for the carrying out of this purpose the regulation expressly provided that intoxicating liquors coming into a state should be completely under control of a state as if the liquor had been manufactured therein, it would be, we think, a disregard of the purposes of Congress to hold that the owner of intoxicating liquors in one state can, by virtue of the commerce clause, go himself or send his agent into such other state, there in defiance of the law of the state, to carry on the business of soliciting proposals for the purchase of intoxicating liquors." In distinguishing this case from those in which the goods had been in the hands of a common carrier, under an interstate ship-
93 ment, it was said: "The rulings in the previous cases to the effect that, under the Wilson Act, state authority did not extend over liquor shipped from one state into another until arrival and delivery to the consignee at the point of destination, were but a recognition of the fact that Congress did not intend, in adopting the Wilson Act, even if it lawfully could have done so, to authorize one state to exert its authority in another state by preventing the delivery of liquor embraced by transactions made in such other state. The purpose here relied on is widely different, since it is that, despite the Wilson Act, the State of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting proposals for the purchase of liquors, because the proposals related to liquor situated in another state. But the business of soliciting proposals in South Dakota was one which that state had a right to regulate, wholly irrespective of when or where it was contemplated the proposals should be accepted or whence the liquor which they embraced was to be shipped."

It being thus established that, by the Wilson Act, the mere solicitation within the state of orders for liquors, located outside the state, is rendered subject to regulation by the police power of the state, it necessarily follows that the making of a contract, by the acceptance of orders, within the state is also subject to the exercise of the police power. The solicitation of an order is a mere preliminary to the contract. The authority of the state to thus regulate an incident preliminary to the introduction of the liquor within the state, is based upon its power to regulate the traffic. If it may regulate the solicitation of orders it may also regulate the
94 acceptance of orders and the making of contracts within the state. This defendant entered into a contract, in Pennsylvania, the execution of which necessarily involved a violation of the law of the state, and he executed that contract according to its terms. The decisions involving the rights of common carriers, of inter-state commerce, above referred to, have no application to this case. This defendant never parted with the actual possession of his property, it continued in his personal control down until the moment he delivered it to the purchasers in Pennsylvania, in violation of the law of the state. There was here no bailment for purposes of transportation, no carrier intervened between seller and purchaser, there was no consignee. The liquors were not only the property of the defendant but they were in his actual possession down until the moment he delivered them to the purchasers, in Pennsylvania, and thus completed the sale.

The judgment is affirmed, and it is ordered that the defendant appear in the court below at such time as he may be there called and that he be by that court committed until he has complied with that part of the sentence which had not been performed at the time this appeal was made a supersedeas.

95 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, set:

I, George Pearson, Prothonotary of the Superior Court of Pennsylvania, sitting at Pittsburgh, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire opinion in the case of Commonwealth vs. Tony Rossi at No. 17 April Term, 1913 as full, entire and complete as the same remains on file in the said Superior Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Pittsburgh, in the County of Allegheny, sitting at Pittsburgh, as aforesaid, this 22nd day of April in the year of our Lord One Thousand Nine Hundred and thirteen.

[Seal of the Superior Court of Pennsylvania.]

GEORGE PEARSON,
Prothonotary.

96 In the Supreme Court of Pennsylvania, Western District.

No. —. October Term, 1913.

COMMONWEALTH
vs.
TONY ROSSI, Appellant.

Petition for Allowance of Appeal from Judgment of the Superior Court.

To the Honorable the Judges of said Court:

The petition of Tony Rossi respectfully represents:

That he is a resident and citizen of the Town of Lowellville, State of Ohio, where he carries on a wholesale and retail liquor business. That at No. 43 March Sessions, 1912, in the Court of Quarter Sessions of Lawrence County, Pennsylvania, he was indicted and convicted of the crime of selling liquor without a license in said county under the provisions of the Act of May 13, 1887, P. L. 113. Petitioner was thereupon sentenced by said court to pay a fine of $500 and costs and undergo imprisonment in the Allegheny County Workhouse for a period of seven months. Petitioner then appealed to the Superior Court of Pennsylvania, which appeal was duly ordered to operate as a supersedeas upon his giving bond, which bond was given and duly approved.

97 That your petitioner diligently prosecuted his appeal and the same was argued before the Superior Court of Pennsylvania, and, upon the 21st day of April, 1913, said Superior Court affirmed the judgment of the aforesaid Court of Quarter Sessions of Lawrence County and ordered the record to be remitted so that the sentence imposed by that court might be carried out. Your petitioner files herewith a copy of the paper books filed in the Superior Court as aforesaid and attaches hereto a certified copy of the opinion of that court.

Your petitioner further represents that the question involved in this case is whether or not the acts for which your petitioner was indicted and convicted were acts constituting the transaction of interstate commerce, and, therefore, within the protection of the Constitution of the United States and without the control of the State of Pennsylvania. This question was raised in the Court of Quarter Sessions by bill of exceptions and in the Superior Court by assignments of error filed therein, and arises from the following state of facts:

Petitioner does a wholesale and retail liquor business in the town of Lowellville, State of Ohio, where he is duly licensed under the laws of said state. For the past ten years he has kept a saloon and grocery store in said town where he has lived for some fifteen years. The County of Mahoning, State of Ohio, wherein said Town of Lowellville is situated, immediately adjoins the county of Lawrence, State of Pennsylvania, and it had been the custom of this

petitioner to deliver liquor to such residents of Lawrence County as might order the same, such deliveries always being made direct from his store or saloon in Ohio. The particular sales in question had been made by your petitioner in such manner, the orders having been first taken (it will be assumed) in Lawrence
98 County, Pennsylvania, and delivered subsequently in pursuance of the orders, direct from your petitioner's place of business in Ohio to the purchasers in Pennsylvania. The goods were transported in petitioner's wagon in one continuous and uninterrupted movement from his place of business in Ohio to the residence of the person giving the order in Pennsylvania.

Under this state of facts, petitioner contends that he was engaged in interstate commerce in its purest and most elementary form, the transportation of the goods from one state to the other being the final and most essential incident to the completion of the sale; that he did not, therefore, come within the police power of the state; and that his conviction was a violation of Article I, Section 8, Clause 3 of the Constitution of the United States giving the courts exclusive power to regulate commerce among the several states as that provision has been construed by the Supreme Court of the United States. And your petitioner alleges that at least two of the most important and controlling cases decided by the United States Supreme Court, and relied upon by him in his argument, viz: Caldwell v. North Carolina, 187 U. S. 622, 47 L. Ed. 336 (1902) and American Express Co. v. Iowa, 196 U. S. 133, 49 L. Ed. 417 (1905), were not mentioned or adverted to in the opinion of the Supreme Court of Pennsylvania.

Wherefore your petitioner says that this case involves the construction and application of the Constitution of the United States and prays your Honorable Court to allow him an appeal in said case from the judgment of the Superior Court of Pennsylvania to your Honorable Court and that said appeal may operate as a supersedeas.

And he will ever pray etc.

TONY ROSSI,
By H. C. McCLINTOCK,
His Att'y.

99 STATE OF PENNSYLVANIA,
County of Allegheny:

H. C. McClintock, being first duly sworn, according to law, deposes and says that he is attorney for the said Tony Rossi, petitioner above named, and the agent for him in this behalf; that the appeal prayed for by petitioner in his said petition is not intended for delay but because he believes that petitioner has suffered injustice by the judgment from which he desires to appeal.

H. C. McCLINTOCK.

Sworn to and subscribed before me this twenty-ninth day of April, 1913.

FRANK McC. PAINTER,
Notary Public.

My Commission expires February 21, 1913.

100 Page 63. In the Supreme Court of Pennsylvania, Western District. Commonwealth vs. Tony Rossi. Petition for Allowance of Appeal from Judgment of the Superior Court and Order of Court Allowing Same. 30 April, 1913.—Application refused. P. C. Filed Apr. 29, 1913. Supreme Court, W. D. Young, McClintock & Painter, 1508 Park Building, Pittsburgh.

101 In the Superior Court of Pennsylvania, Western District.

No. 17, April Term, 1913.

COMMONWEALTH
vs.
TONY ROSSI, Appellant.

Appeal, Q. S., Lawrence County.

Order to Retain Record Pending Petition for Appeal.

And now, to wit, this 29th day of April, 1913, on motion of Young, McClintock & Painter, attorneys for Tony Rossi, appellant, it is ordered that the Prothonotary of the Superior Court retain the record in the above entitled case until the petition by said appellant for the allowance of an appeal to the Supreme Court of Pennsylvania has been disposed of.

BY THE COURT.
R.

We hereby certify that we have filed petition for allowance of appeal to the Supreme Court of Pennsylvania in the above entitled case.

YOUNG, McCLINTOCK & PAINTER,
Attorneys for Petitioner.

102 No. 17, April Term, 1913. In the Superior Court of Pennsylvania, Western District. Commonwealth vs. Tony Rossi, Appellant. Order to retain record pending petition for Appeal. Filed Apr. 29, 1913. Supreme Court, W. D. Young, McClintock & Painter, 1508 Park Building, Pittsburgh, Pa.

103 In the Superior Court of Pennsylvania.

No. 17, April Term, 1913.

COMMONWEALTH
vs.
TONY ROSSI, Appellant.

Order.

And now, to wit, this 2nd day of May, 1913, upon application of Young, McClintock & Painter, attorneys for plaintiff in error, it is

ordered that the prothonotary hold the record in the above entitled case for thirty days, pending the application for writ of error to the Supreme Court of the United States.

BY THE COURT.
R.

104 No. 17, April Term, 1913. Commonwealth vs. Tony Rossi, Appellant. Order. Filed May 2, 1913. Superior Court, Fifth District.

105 COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, sct:

I, George Pearson, Prothonotary of the Superior Court of Pennsylvania, sitting at Pittsburgh, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire Record in the case of Commonwealth vs. Tony Rossi at No. 17 April Term, 1913 as full, entire and complete as the same remains on file in the said Superior Court, in the case there stated: and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Pittsburgh, in the Count of Allegheny, sitting at Pittsburgh, as aforesaid, this twentieth day of May in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal of the Superior Court of Pennsylvania.]

GEORGE PEARSON,
Prothonotary.

[Endorsed:] No. 17, April Term 1913. Commonwealth vs. Tony Rossi. Exemplification.

106 I, William D. Porter, Judge of the Superior Court of the Commonwealth of Pennsylvania, do hereby certify that George Pearson was at the time of signing the annexed attestation and now is Prothonotary of the said The Superior Court of Pennsylvania, sitting at Pittsburgh, to whose acts as such full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof I have hereunto subscribed my name this twentieth day of May Anno Domini One Thousand Nine Hundred and Thirteen.

WILLIAM D. PORTER,
Judge of the Superior Court.

I, George Pearson, Prothonotary of The Superior Court of the Commonwealth of Pennsylvania, sitting at Pittsburgh, do hereby certify that the Honorable William D. Porter, by whom the fore-

going certificate was made and given, was at the time of making and giving the same and is now a Judge of the Superior Court of the Commonwealth of Pennsylvania; to whose acts as such full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature thereto subscribed is genuine.

In testimony whereof I have hereunto set my hand and affixed the Seal of the said Superior Court at Pittsburgh this twentieth day of May A. D. 1913.

[Seal of the Supreme Court of Pennsylvania.]

GEORGE PEARSON.

107 In the Supreme Court of the United States.

TONY ROSSI, Plaintiff in Error.
vs.
COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Assignment of Errors.

Now comes Tony Rossi, plaintiff in error above named, and files herewith his petition for a writ of error and says that there are errors in the records and proceedings of the above entitled case and, for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

The Superior Court of Pennsylvania erred in holding and deciding that the Act of General Assembly of Pennsylvania of 1887, P. L. page 113, was violated by defendant; that the validity of said Act of Assembly when applied to the facts herein proven and admitted was denied and drawn in question by plaintiff in error on the ground of its being contrary and repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

First. The Superior Court of Pennsylvania erred in holding and deciding that Section 15 of the aforesaid statute of Pennsylvania, as applied to the facts herein proven and admitted, was not in
108 conflict with Clause 3, Section 8, of Article 1 of the Constitution of the United States, vesting jurisdiction over interstate commerce in the Congress of the United States.

Second. The Superior Court of Pennsylvania erred in holding and deciding that Section 15 of the aforesaid statute of Pennsylvania, as construed by the courts of that state and as applied to the facts herein proven and admitted, was a valid exercise of the police power of the Commonwealth of Pennsylvania, within the provisions of the Act of Congress approved August 8th, 1890, 26 statutes at Large, 313, Chapter 728, otherwise known as the "Wilson Act."

Third. The Superior Court of Pennsylvania erred in refusing to hold that the undisputed facts herein showed a transaction of interstate commerce, over which the Court of Quarter Sessions of Lawrence County, Pennsylvania, had no jurisdiction.

Fourth. The Superior Court of Pennsylvania erred in rendering its judgment that the judgment of the Court of Quarter Sessions of Lawrence County, Pennsylvania, should be affirmed, and that the plaintiff in error should appear in the court below at such time as he might be there called and that he be by that court committed until he had complied with that part of the sentence which had not been performed at the time his appeal was made a supersedeas.

For which errors, the plaintiff in error prays that the judgment of the Superior Court of Pennsylvania herein, dated April 21st, 1913, be reversed, and a judgment rendered in favor of plaintiff in error and for costs.

YOUNG, McCLINTOCK & PAINTER,
Attorneys for Plaintiff in Error.

109 No. —, October Term, 1913. In the Supreme Court of the United States. Tony Rossi, Plaintiff in Error, vs. Commonwealth of Pennsylvania, Defendant in Error. Assignments of Error. Young, McClintock & Painter, 1508 Park Building, Pittsburgh, Pa.

110 In the Supreme Court of the United States

No. —. October Term, 1913.

TONY ROSSI, Plaintiff in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Petition for Writ of Error.

To the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, and to the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, and to the other Justices of said Honorable Court, and to the Honorable The Supreme Court of the United States:

The petition of Tony Rossi, plaintiff in error, above named, respectfully shows:

That your petitioner brought suit in the Superior Court of Pennsylvania for the Western District of Pennsylvania, to April Term, 1913, No. 17, by an appeal from a judgment of the Court of Quarter Sessions of Lawrence County, Pennsylvania, at March Sessions, 1912, No. 43, in which suit in said Superior Court, your petitioner was appellant and the Commonwealth of Pennsylvania was appellee.

That the said suit in the Court of Quarter Sessions of Lawrence County, Pennsylvania, was a criminal proceeding wherein your petitioner was indicted and charged with the crime of selling liquor in said county without a license and convicted of said crime, whereon he was sentenced by the judgment of said Court of Quarter Sessions to pay a fine of five hundred dollars and costs and to undergo an imprisonment in the workhouse of Allegheny County, State of Pennsylvania, for and during a period of seven months.

111 That, on the 21st day of April, 1913, the Superior Court of Pennsylvania, sitting at Pittsburgh, ordered said judgment to be affirmed and further ordered that your petitioner "appear in the court below at such time as he may be there called and that he be by that court committed until he has complied with that part of the sentence which had not been performed at the time this appeal was made a supersedeas." This order was duly entered and recorded in the Western District of Pennsylvania, as aforesaid.

That, afterwards, on the 29th day of April, 1913, your petitioner applied to the Supreme Court of Pennsylvania for leave to appeal from the judgment of the said Superior Court of Pennsylvania, and, by order duly entered and recorded on the 1st day of May, 1913, allowance of appeal was refused by the Supreme Court of Pennsylvania.

That the judgment of said Superior Court of Pennsylvania is, therefore, a judgment in the highest court of the state of Pennsylvania in which a decision in this suit could be had and the judgment of said court is final.

That the judgment of said Superior Court of Pennsylvania is based upon the following facts, proven by the evidence in the court below:

That your petitioner is a resident and citizen of the town of Lowellville, county of Mahoning and state of Ohio, where, for the past ten years, he has carried on a wholesale and retail liquor business, duly licensed under the laws of Ohio. The county of Mahoning in the state of Ohio immediately adjoins the county of Lawrence in the state of Pennsylvania it being but a short distance of a few miles from said village of Lowellville to the state line between Ohio and Pennsylvania. In said county of Lawrence, state of Pennsylvania, is situate the village of Hillsville, to some of the residents of which petitioner was accustomed to sell liquor. The sale of this liquor took place in the following manner:

112 Orders were given to petitioner for liquor in pursuance of which orders the goods were delivered in Hillsville, Pennsylvania, to the parties ordering the same, delivery being made after receipt of the order by carrying the goods from petitioner's store in the town of Lowellville, Ohio, in a wagon, across the state line. The particular sales in question had been made by petitioner in such manner and the goods were transported in one continuous and uninterrupted movement from his place of business in Ohio to the residence of the purchaser in Pennsylvania.

Your petitioner, therefore, shows that he was engaged in the transaction of interstate commerce; that he was convicted under the statute of Pennsylvania which regulates the sale of liquor within the state, and which makes the sale thereof without a license a misdemeanor; that said statute of Pennsylvania, as applied to the facts in this case, is contrary and repugnant to the Constitution of the United States and particularly is repugnant to Clause 3, Section 8, Article I of the Constitution of the United States which provides that Congress shall have the power to regulate commerce among the several states; that the aforesaid statute of Pennsylvania

could not become effective or operative under the Act of Congress approved August 8th, 1890, 26 Statutes at Large, 313, Chapter 728, otherwise known as the "Wilson Act" until after delivery to the purchaser in Pennsylvania when the importation of said goods from the state of Ohio had ceased and determined.

That the said Court of Quarter Sessions of Lawrence County, Pennsylvania, and the said Superior Court of Pennsylvania had no jurisdiction over the transaction for which your petitioner was convicted for the reason that jurisdiction over such transactions is, by the Constitution of the United States, vested solely in the National Congress which had not then passed any act prohibiting or in any way regulating the transaction complained of in this suit.

That the validity of the statute of Pennsylvania under which your petitioner was convicted as aforesaid was drawn in question in the Court of Quarter Sessions of Lawrence County, Pennsylvania, by exceptions to the charge of said court and in the Superior Court of Pennsylvania by assignments of error on the ground that said statute was repugnant to the Constitution of the United States.

113

Wherefore your petitioner prays for the allowance of a writ of error to the Superior Court of Pennsylvania, the same to operate as a supersedeas herein, in order that the judgment of said court may be re-examined and reversed or affirmed in the Supreme Court of the United States.

And he will ever pray etc.

YOUNG, McCLINTOCK & PAINTER,
Attorneys for Tony Rossi, Plaintiff in Error and Petitioner.

WESTERN DISTRICT OF PENNSYLVANIA,
State of Pennsylvania, County of Allegheny, ss:

H. C. McClintock, being duly sworn, according to law, deposes and says that he is attorney for Tony Rossi, plaintiff in error above named and that the facts set forth in the foregoing petition are true and correct, as he verily believes.

H. C. McCLINTOCK.

Sworn to and subscribed before me this twenty-first day of May, A. D. 1913.

FRANK Mc. C. PAINTER,
Notary Public.

[Seal Frank Mc. C. Painter.]

My Commission Expires February 21, 1915.

114 *Order.*

Let the writ of error issue upon the execution of a bond by the said Tony Rossi to the Commonwealth of Pennsylvania in the sum of one thousand five hundred dollars ($1,500), said bond to act as a supersedeas, when approved.

——— ———.

115 [Endorsed:] No. —, October Term, 1913. In the Supreme Court of the United States. Tony Rossi, Plaintiff in Error vs. Commonwealth of Pennsylvania, Defendant in Error. Petition for Writ of Error. Allowed May 28, 1913. Mahlon Pitney, Associate Justice. Young, McClintock & Painter, 1508 Park Building, Pittsburgh, Pa.

116 In the Supreme Court of the United States.

TONY ROSSI, Plaintiff in Error,
vs.
COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.

Bond.

Know all men by these presents that we, Tony Rossi, as principal, and F. A. Maddas and Anthony Onorato, as sureties, are held and firmly bound unto the Commonwealth of Pennsylvania to the use of all parties interested in the sum of one thousand five hundred dollars ($1,500), lawful money of the United States to be paid to the said Commonwealth of Pennsylvania to the use of the party or parties entitled thereto or their certain executors, administrators and assigns, to which payment well and truly to be made, we bind ourselves, our executors and administrators and every of them firmly by these presents.

Sealed with our seals and dated this seventh day of May, A. D. 1913.

Whereas the above named Tony Rossi, plaintiff in error, seeks to prosecute his writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Superior Court of the Commonwealth of Pennsylvania:

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute the said
117 writ of error to effect and answer all costs and damages that may be adjudged if he shall fail to make good his appeal, then this obligation to be void; otherwise to remain in full force and virtue.

ANTONIO ROSSI. [SEAL.]
F. A. MADDAS. [SEAL.]
ANTINY ONORATO. [SEAL.]

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

F. A. Maddas and Anthony Onorato, being duly sworn, according to law, depose and say that they are each of lawful age and each citizens of the United States owning real estate in the counties of Allegheny and Fayette, state of Pennsylvania, as hereinafter set forth and know the contents of the foregoing instrument to which they have attached their names and that each for himself says that

he is worth the sum of one thousand five hundred dollars over and above all debts, liabilities and exemptions.

F. A. MADDAS.
ANTONY ONORATO.

Sworn and subscribed this 7th day of May, 1913.

CHARLES E. RICE,
Pres't Judge.

118 I, F. A. Maddas, am the owner of an undivided one-half interest in a tract of land in the Township of Mt. Lebanon (formerly Scott) county of Allegheny, state of Pennsylvania, comprising eighteen acres of land on Washington Road, for which tract was paid the sum of twelve thousand dollars at public sale and against which there is a mortgage of eight thousand dollars; I am also the owner of improved real estate in the town of Masontown, county of Fayette, state of Pennsylvania, for which I paid and in which he has invested more than twenty thousand dollars and against which there are no mortgages or encumbrances.

F. A. MADDAS.

I, Anthony Onorato, am the owner of a tract of land situate in the Eighth Ward, city of Pittsburgh, state of Pennsylvania, being improved lot on Lorigan Street, assessed in the sum of three thousand one hundred dollars, against which there are no mortgages or encumbrances.

ANTONY ONORATO.

Now, May 7, '13 the above bond and sufficiency of the sureties are approved.

CHARLES E. RICE,
President Judge Superior Court of Pennsylvania.

119 Approved May 28, 1913.

MAHLON PITNEY,
Associate Justice.

YOUNG, McCLINTOCK & PAINTER,
1508 *Park Building, Pittsburgh, Pa.*

120 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Superior Court of the State of Pennsylvania, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Superior Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Tony Rossi, appellant, and The Commonwealth of Pennsylvania,

appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution; or of a
121 treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant, Tony Rossi, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 28th day of May, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

122 STATE OF PENNSYLVANIA,
County of Allegheny, ss:

I, George Pearson, Prothonotary of the Superior Court of Pennsylvania, sitting at Pittsburgh, do hereby certify that the original bond and copy of writ of error allowed in re Commonwealth against Tony Rossi has been duly lodged in this office.

GEORGE PEARSON,
Prothonotary.

123 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the

Clerk's Office of the Superior Court of the State of Pennsylvania, wherein Tony Rossi is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this twenty-eighth day of May, in the year of our Lord one thousand nine hundred and thirteen.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

124 Now May 28, 1913, I hereby accept service of the within citation.

THOMAS W. DICKEY,
District Attorney for Lawrence County, Penna.

125 UNITED STATES OF AMERICA,
Superior Court of Pennsylvania, ss:

In obedience to the commands of the within writ I her-with transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceeding in the within entitled case with all things concerning the same.

In witness whereof I hereunto subscribe my name and affix the seal of the said Superior Court, in the city of Pittsburgh, this June 2nd, 1913.

[Seal of the Superior Court of Pennsylvania.]

GEORGE PEARSON,
Prothonotary Superior Court.

Costs of suit:

Costs of transcript..... $68.00

Paid by Toni Rossi, defendant.

GEORGE PEARSON,
Prothonotary Superior Court.

Endorsed on cover: File No. 23,747. Pennsylvania Superior Court. Term No. 193. Tony Rossi, plaintiff in error, vs. The Commonwealth of Pennsylvania. Filed June 12th, 1913. File No. 23,747.

FILED
MAR 11 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 193.

TONY ROSSI, Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

In Error to the Superior Court of the State of Pennsylvania.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

H. C. McCLINTOCK,
YOUNG, McCLINTOCK & PAINTER,
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IN THE

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OCTOBER TERM, 1914.

No. 193.

TONY ROSSI, Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,
Defendant in Error.

In Error to the Superior Court of the State of Pennsylvania.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

In Brief.

Plaintiff in error was convicted in the Court of Quarter Sessions of Lawrence County, State of Pennsylvania, of the crime of selling liquor without a license contrary to the Pennsylvania liquor law. The following facts were proven and are admitted to have constituted the alleged criminal transaction:

1. An order for liquor taken in Pennsylvania by plaintiff in error, a citizen of Ohio.

2. A delivery of the liquor on a subsequent day in pursuance of the order, delivery being made direct from the seller's store in Ohio to the purchaser in Pennsylvania.

The single question presented is whether these acts constitute a violation of the Pennsylvania liquor law, or come within the protection of the interstate commerce clause of the United States Constitution.

In Detail.

Plaintiff in error is a wholesale and retail liquor dealer with his place of business situated in the Village of Lowellville, County of Mahoning, State of Ohio. This county immediately adjoins the County of Lawrence in the State of Pennsylvania, to one of the residents of which plaintiff in error is proven to have sold liquor.

It is admitted that the order for liquor was taken by plaintiff in error in Pennsylvania; that upon a sub-

sequent day the liquor was delivered to the purchaser in Pennsylvania by an agent of plaintiff in error, the agent carrying the goods in a wagon from the seller's store in Ohio direct to the residence of the purchaser in Hillsville, Pennsylvania; that the goods so delivered were wrapped in packages at the seller's store in Ohio and marked with the proper name and address of the purchaser; that credit was allowed and the money afterwards collected.

Plaintiff in error was convicted of violating the Pennsylvania statute of May 13, 1887, P. L. 113, under instructions to the jury which held him guilty of the crime of selling liquor without a license, provided both the acceptance of the offer to buy *and* the subsequent delivery in pursuance thereof took place in Pennsylvania.

The charge of the court was excepted to by plaintiff in error as set forth in the Specification of Errors (*infra*), and the exceptions were duly filed in accordance with the Pennsylvania practice, as regulated by the Act of May 11, 1911, P. L. 279.

The conviction was afterwards affirmed by the Superior Court of Pennsylvania on the ground that, under the Act of Congress known as the "Wilson Act," the State of Pennsylvania could lawfully regulate the sale of liquor, even though the sale embodied a delivery and transportation thereof in interstate commerce. An appeal to the Supreme Court of Pennsylvania was refused.

SPECIFICATION OF ERRORS.

Plaintiff in error hereby specifies the following errors upon which he intends to rely:

FIRST. The Superior Court of Pennsylvania erred in rendering the following judgment, namely:

> "The judgment is affirmed, and it is ordered that the defendant appear in the court below at such time as he may be there called and that he be by that court committed until he has complied with that part of the sentence which had not been performed at the time this appeal was made a supersedeas."

SECOND. The Superior Court of Pennsylvania erred in not reversing the judgment of the Court of Quarter Sessions of Lawrence County, Pennsylvania, and remanding the case with directions to enter judgment for defendant.

THIRD. The Superior Court of Pennsylvania erred in entering the foregoing judgment and refusing to sustain the following exceptions by plaintiff in error, the exception, and the portion of the court's charge excepted to, and the ground for exception, being as follows:

> "(1) Defendant excepts to that portion of the court's charge to the jury which reads as follows:
>
> 'You have heard the testimony of the witnesses in this case. It appears that on or about the 19th day of February, 1912, and at divers other times during the last two years, that this defendant has been engaged in running a licensed wholesale or retail liquor establishment at Lowellville, Ohio, and that it has been his practice to come to Hillsville in Lawrence County, Pennsylvania, frequently during that time.
>
> 'It is contended by the Commonwealth that on this 19th day of February, and at div-

ers other times during the past two years, he has taken orders for intoxicating liquors there —spirituous, vinous, malt and brewed liquors, and that afterwards the liquors were delivered by him or by his agent, and after that was done he made collections for the liquors so sold and delivered. Now, it is not denied by the defendant but he says he has not been engaged in taking orders for liquors in Lawrence County—that he delivered no liquor in Lawrence County except for which he receives an order personally at his store. Now, then, gentlemen of the jury, the question as to whether or not an order was taken for the liquor that gives rise to this prosecution comes to be a very important one in the testimony. It simply reduces itself to the question as to whether or not this defendant took the order from Mrs. Kleim and you have the testimony of but two witnesses to that transaction.'

"The reason assigned for this exception is that this language, in effect, instructs the jury that the taking of orders in Lawrence County by parties not licensed by the courts of that county for liquor which is subsequently shipped from Ohio and delivered to the person giving said order in Lawrence County constitutes a sale of liquor in Lawrence County in violation of the laws of the State of Pennsylvania, and ignores the fact that such a shipment and sale of liquor would constitute a transaction of interstate commerce to which the laws of Pennsylvania could not apply."

FOURTH. The Superior Court of Pennsylvania erred in entering the foregoing judgment and refusing to sustain the following exception by plaintiff in error, the exception, and the portion of the court's charge excepted to, and the ground for exception, being as follows:

"(2) Defendant excepts to that portion of the court's charge to the jury which reads as follows:

'In this case, gentlemen of the jury, it makes no difference whether this defendant has a license to sell liquor or not in Ohio. We are not concerned about that question. He has no license to sell liquors in Lawrence County, Pennsylvania. A sale consists of a demand for or an offer to purchase a commodity, a delivery of that commodity and a payment for it. These are the three elements that constitute a sale. Those three elements enter into the sale of every article, whether it be sugar, tea, coffee, hay or intoxicating liquors. There is the demand or offer to purchase, second the delivery of the matter that is to be sold, and, third, the payment for it. Now then, was there a demand or an offer to purchase the liquor made in Lawrence County, Pennsylvania? Because, gentlemen, these three items must have occurred or taken place in Lawrence County to justify a conviction. Now then, was there a demand or offer to purchase made in Lawrence County by Mrs. Kleim? Did she ask the defendant to deliver her certain liquors? Was there any understanding or agreement between them in Lawrence County looking to the delivery and payment for the liquor? You have the testimony of Mrs. Kleim on one side as to that and the testimony of Mr. Rossi on the other. Now, if you find that the offer to purchase was not made in Lawrence County,—that instead of being made in Lawrence County it was made at Lowellville, Ohio, then that would be one item which it takes to constitute a sale that is not present in Lawrence County, and it must have occurred in Lawrence County in order to make it an offence under the statute. So you will look at this testimony carefully, gentlemen, as to whether or not there was a demand made in this county and whether or not Mrs. Kleim requested this defendant to deliver her liquors at her home in Hillsville.'

"Same reason assigned as in (1)."

FIFTH. The Superior Court of Pennsylvania erred in entering the foregoing judgment and refusing to sustain the following exception by plaintiff in error, the exception, and the portion of the court's charge excepted to, and the ground for exception, being as follows:

"(3) Defendant excepts to that portion of the court's charge to the jury which reads as follows:

'But the real dispute comes as to whether or not the first item or element I have mentioned—that is the offer or request for liquor, was made to the defendant in Lawrence County by this prosecuting witness, Mrs. Kleim.'

"Same reason assigned as in (1)."

SIXTH. The Superior Court of Pennsylvania erred in entering the foregoing judgment and refusing to sustain the following exception by plaintiff in error, the exception, and the portion of the court's charge excepted to, and the ground for exception, being as follows:

"(4) Defendant excepts to that portion of the court's charge to the jury which reads as follows:

'This proceeding is had, gentlemen, under the act of assembly which provides:

"That if any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquor, or any admixture thereof without a license shall be sentenced," &c.

'So that the act of assembly is plain on its face, and the question that you are to answer is, Did the defendant make a sale of liquor in Lawrence County at the time alleged, or within two years prior thereto? If you are satisfied under the evidence, beyond a reasonable doubt, that he did, then it is your duty to return a verdict of guilty.'

"Same reason assigned as in (1)."

ARGUMENT.

There is no dispute as to the essential facts in this case. Throughout our argument the facts as proven in the testimony adduced by the Commonwealth are admitted, viz., that the order for liquor was taken by plaintiff in error in the State of Pennsylvania and that subsequently the order was filled by a carriage of the liquor from Ohio into Pennsylvania. We earnestly contend that these facts do not show plaintiff in error to be guilty of any crime against the law of Pennsylvania, and that the judgment herein rendered must be reversed.

Point I.

The Pennsylvania statute in question applies only to completed sales of liquor; and a delivery or tender of delivery is essential to the crime of selling without a license.

The Pennsylvania statute of May 13, 1887, P. L. 108, 113, under which plaintiff in error was convicted, is known as the "Brooks Law" and has been said to have "reduced to a comprehensive system all the features of all the license laws at its date on our statute books." *Klein vs. Livingston Club,* 177 Pa., 224 (1896). It is entitled, "An Act to restrain and regulate the sale of vinous, spirituous, malt or brewed liquors, or any admixture thereof," and, after requiring and providing for the licensing of retail liquor dealers by the Courts

of Quarter Sessions in the various counties of the state, contains the following provision for the violation of which plaintiff in error was tried:

> "Section 15. Any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquors, or any admixture thereof, without a license, shall be sentenced to pay a fine of not less than five hundred dollars, nor more than five thousand dollars, and undergo an imprisonment in the county jail of not less than three months, nor more than twelve months."

The Pennsylvania cases all hold that the statute as above set forth does not prohibit the mere taking of an order, or the making of an executory contract for the sale of liquor. It is well settled under our decisions that the words "selling or offering for sale" do not comprise the mere offer to sell liquor, but only those offers which are accompanied or followed by a delivery or a tender of delivery. The mere solicitation or taking of orders away from the dealer's place of business has many times been held to be not within the inhibition of the statute. In other words, it is only sales which have been completed so far as the seller is concerned that are held to be a crime under the statute, a delivery or tender of the goods being an essential element in the crime.

A. This construction is the law of this case.

It was not for a moment supposed by the Superior Court that the mere taking of the order for liquor in Pennsylvania was a violation of the law. The contrary

is clearly stated in the following words of the opinion (Record, page 46):

> "This defendant entered into a contract, in Pennsylvania, *the execution of which* necessarily involved a violation of the law of the state, and he executed that contract according to its terms. * * * This defendant never parted with the actual possession of his property, it continued in his personal control down until the moment he *delivered it* to the purchasers in Pennsylvania, *in violation of the law of the state.*"

Language could not be plainer to show that it was the *delivery* of the liquor to the purchaser in Pennsylvania which constituted the crime in this case. In fact the whole case was tried upon this theory: The trial court charged the jury that plaintiff in error could not be convicted unless he had made delivery of the liquor in Lawrence County, Pennsylvania, (see Record, page 25). The jury were expressly instructed that, under the law of Pennsylvania, both the order must have been taken *and* the delivery made in that state, in order to allow a conviction under the statute.

So, on the record before the Court, plaintiff in error was convicted of a crime, the essential element in which was an act of interstate commerce.

The Commonwealth of Pennsylvania will, doubtless, admit this, and, also, that, under the Pennsylvania authorities, no crime could have resulted without a delivery.

B. The Pennsylvania cases construing the statute.

That the trial and appellate courts in our case have correctly construed the statute is shown by a number of Pennsylvania cases.

We believe the law was correctly stated by the court in the case of *Commonwealth vs Smith et al.*, 16 Pa. Co. Ct., 644 (1895), where it charged the jury as follows:

> "Licensed men cannot sell at any other place than the place of business for which they are licensed. *Now, what is a sale? It is not an order.* You may meet a licensed man on the street and order him to send you a gallon of whiskey, or a case of wine, or a box of beer, but that is not a sale. When he takes your order and goes to his place of business, fills the order and sets the goods aside, that is a sale. A mere order is not a sale. *Now, it has been held that men can take orders away from their places of business. That is not a sale; it is an order.*"

One of the most recent cases in Pennsylvania upon this subject is *Commonwealth vs. Guinzberg,* 46 Pa. Super. Ct., 488 (1911).* In that case, defendant was

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* Note:—Since the creation of the Superior Court of Pennsylvania by Act of Assembly, dated June 24, 1895, P. L. 217, it has had jurisdiction over all appeals from the Courts of Quarter Sessions throughout the state. Subsequent to the year 1895 the Pennsylvania Superior Court has therefore been the court of last resort in all cases involving a construction of the Pennsylvania liquor laws, as such questions arise in the Courts of Quarter Sessions, and as appeals from the Superior to the Supreme Court of Pennsylvania are allowed only in certain rare cases, such as those involving the jurisdiction of the Superior Court, or questions pertaining to the state or United States Constitution.

indicted for selling liquor to residents of Jefferson County, Pennsylvania, his place of business being in Clearfield County, where he had a license. The orders were taken in Jefferson County; the liquor was set apart and labeled with the names of the purchasers at the seller's place of business in Clearfield County; it was afterwards placed in defendant's wagon and delivered to the purchasers. These facts were admitted, but it was claimed that, as a matter of law, title had passed to the purchasers in Clearfield County

The whole question at issue was in which of the two counties title had passed to the purchasers. This question was left to the jury under instructions that defendant would not be guilty of any violation of the statute if they found that title passed to the purchasers in Clearfield County, and that this, in turn, depended upon where delivery had been made under the agreement. The jury were expressly instructed, as in our case, that, in order to convict defendant, they must find that delivery in Jefferson County was stipulated for *and* that such delivery took place. These instructions were affirmed, the place of making the agreement being regarded as entirely immaterial, but the place of delivery as vital. The lower court charged, in part, as follows:

> "If the contract contained an agreement on the part of the defendant to deliver the liquors purchased to the purchaser in Falls Creek *and in pursuance thereof they were so delivered,* then the sale was made in Falls Creek in violation of law, and in that case your verdict should be one of 'guilty as indicted.' If it did not contain an agreement to deliver the liquors to the purchaser in Falls Creek and they were not so delivered, then

there would be no violation of the law and your verdict should be one of 'not guilty.' * * *

"And if the evidence warrants a finding that the contract as actually made required a delivery of the liquors by the dealer at a place other than his place of business, *and* that they were so delivered in pursuance of the contract as actually made, he may be found guilty of selling without a license, notwithstanding the contract as expressed in words or in writing formally provides for a delivery at the defendant's place of business."

The foregoing was affirmed as a correct statement of the law, and the following portions of the charge were also quoted with approval in the opinion of the Superior Court (pages 497, 498):

" 'The defendant's contention is that there was no agreement on his part or on the part of his agent to carry this beer or whiskey to Falls Creek and there deliver it to the person ordering the same; that it was to be delivered at the defendant's place of business in Dubois, and that the actual delivery from that point was made by the defendant's driver as the agent of the purchaser and at the purchaser's risk. And if you so find from the evidence, then you will acquit the defendant.' And, again, 'On the other hand, if the agreement, expressed or implied, was that the beer or whiskey was to be turned over to the purchaser at the defendant's place of business for delivery—whether by common carrier or otherwise—such transaction would be a sale at the defendant's place of business, and as such would be authorized by the license which he holds, and your verdict therefore would be 'not

guilty,' even though the defendant personally or by another, as the agent of the purchaser, may have delivered the beer and whiskey to him in Falls Creek."

The court reviews at length the decisions in Pennsylvania relating to the illegal sale of liquor and cites practically all the important authorities on this subject In discussing the question of what constitutes an illegal sale in violation of the statute, the court says:

"Where the vendor through his agent enters into a contract in another county for the sale of liquor and a delivery of the same to the buyer at his home or place of business the transaction may amount to a sale in that county. In that case the agreement to sell is executory and not completed until the delivery of the goods at the place where the contract stipulated. Such a sale comprises the order taken and the goods delivered at the destination according to the agreement. *Delivery, actual or constructive, is necessary to complete the sale and the manner of delivery is a proper subject of agreement between the buyer and seller.*"

In the foregoing case, the court cites and expressly re-affirms the decision in *Garbracht vs. Commonwealth,* 96 Pa., 449, where it was held that delivery of liquor and passage of title to the purchaser was essential to the crime of selling without a license, the court in the latter case saying:

"To constitute a sale of personal property, especially under a penal statute, there must be a transfer of the title for a certain consideration. Orders for goods may be received, but until they

are transferred or set apart to the purchaser, the sale is incomplete. Delivery, either actual or constructive, is an essential ingredient in a sale of personal property. An agreement to sell is only executory until the contract is completed by delivery."

To the same effect is *Star Brewing Company's License,* 43 Pa. Super. Ct., 577 (1910).

It is needless to multiply cases in support of the proposition that the Pennsylvania statute of 1887 does not prohibit the mere taking of orders or the making of executory contracts for the sale of liquor. *The very fact that, in every reported case in Pennsylvania involving the illegal sale of liquor, the chief and only point of inquiry has been in regard to the place where title has passed to the purchaser, shows conclusively that it is the executed sale and not the executory agreement that constitutes the crime under our laws.* We challenge counsel for the defendant in error to produce a single case in Pennsylvania where a person has been convicted of violating the statute in question when the contract has remained executory, delivery of the liquor never having been made.

This being the case we are at once brought to the question of whether a state can, under its police power, fasten upon and punish the execution of a contract previously entered into, when the execution thereof consists solely in transporting the goods from one state to another.

Point II.

Delivery of the liquor being an essential element in the alleged crime, and delivery having been accomplished by transportation in interstate commerce, the transaction was not subject to the police power of Pennsylvania under the Wilson Act.

A. The Wilson Act—its purpose and effect.

By Clause 3 of Section 8, Article 1, of the Constitution of the United Statees it is provided that the Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Under the many decisions in the United States Supreme Court construing this clause, there can be no doubt that, if this were a transaction relating to any legitimate article of commerce other than intoxicating liquors, its entire freedom from state control would be certain—not only as to the transportation of the article, but also as to the negotiation of the contract and all the component parts of the sale. Intoxicating liquors have, however, been placed upon a different footing from all other commodities in interstate commerce by virtue of the Wilson Act. The present case squarely presents the question of the manner in which the state may, under that Act, regulate transactions for the purchase, sale and delivery of liquor between citizens of different states.

The act of Congress known as the "Wilson Act" was approved August 8, 1890 (26 Stat. at Large, 313, c. 728) and provides as follows:

"That all fermented, distilled, and other intoxicating liquors or liquids, transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory exacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory and shall not be exempted therefrom by reason of being introduced therein in original packages or otherwise."

It was passed immediately after the decision in *Leisy vs. Hardin*, 135 U. S., 100; 34 L. Ed., 128 (1890), which afforded the same protection to interstate commerce in liquor as was given to any other commodity, by upholding the right of an importer to resell in the original package the liquor so imported. The constitutionality of the Act was sustained in *Wilkerson vs. Rahrer*, 140 U. S., 545; 35 L. Ed., 572 (1891) on the ground that it did not enlarge the powers of the states, but simply divested the interstate character of shipments upon their arrival within the state, so as to allow the laws of the state to operate against them.

The first case to construe the Act and limit its scope was *Rhodes vs. State of Iowa*, 170 U. S., 412; 42 L. Ed., 1088 (1897), where it was definitely settled that the police power of a state under the Wilson Act could not attach to or control an interstate shipment of liquor until *after delivery to the consignee within the state.* This interpretation of the Wilson Act was based upon the ground that otherwise the laws of the

states would be given force and effect beyond their borders. This is forcibly pointed out by Mr. Justice White in the following language:

> "The *fundamental right* which the decision in the Bowman case (i. e. *Bowman vs. Chicago and Northwestern R. R. Co.*, 125 U. S., 465; 31 L. Ed. 700) held to be protected from the operation of state laws by the Constitution of the United States was the continuity of shipment of goods coming from one state into another from the point of transmission to the point of consignment, and the accomplishment there of the delivery covered by the contract.
>
> * * * * * * *
>
> "But to uphold the meaning of the word 'arrival', which is necessary to support the state law, as construed below, forces the conclusion that the act of Congress in question authorized state laws to forbid the bringing into the state at all. This follows from the fact that if arrival means crossing the line, then the act of crossing into the state would be a violation of the state law, and hence necessarily the operation of the law is to forbid crossing the line and to compel remaining beyond the same. Thus, if the construction of the word 'arrival' be that which is claimed for it, it must be held that the state statute attached and operated beyond the state line confessedly before the time when it was intended by the act of Congress it should take effect."

The right of a citizen of one state to ship liquor to a citizen of another, free from all state regulation was clearly established by the case of *Vance vs. Vandercook Co.*, 170 U. S., 438; 42 L. Ed. 1100 (1897), which was decided on the same day as the Rhodes case, *supra.*

In the *Vandercook Company* case the court held that it would be unconstitutional to apply the dispensary law of South Carolina to a shipment of liquor made by a citizen of another state to a citizen of South Carolina. In writing the opinion the same learned Justice says:

> "Equally well established is the proposition that *the right to send liquors from one state into another, and the act of sending the same, is interstate commerce*, the regulation whereof has been committed by the Constitution of the United States to Congress, and hence, that a state law which denies such a right, or substantially interferes or hampers the same, is in conflict with the Constitution of the United States."
>
> (Quoted with approval in *Adams Express Co. vs. Kentucky*, 214 U. S., 218; 53 L. Ed. 972.)
>
> * * * * * * *
>
> "The interstate commerce clause of the Constitution guarantees *the right to ship merchandise from one state into another, and protects it until the termination of the shipment by delivery at the place of consignment*, and this right is wholly unaffected by the act of Congress which allows state authority to attach to the original package before sale but only after delivery. *Scott vs. Donald*, and *Rhodes vs. The State of Iowa, supra.*"
>
> (Quoted with approval in *Heyman vs. Southern Rwy. Co*, 203 U. S., 270; 51 L. Ed. 178.)
>
> * * * * * * *
>
> "The right of a citizen of another state to avail himself of interstate commerce * * * exists wholly independent of the will of either the law-making or the executive power of the state; it takes its origin outside of the state of South Caro-

lina, and finds its support in the Constitution of the United States. *Whether or not it may be exercised depends solely upon the will of the person making the shipment,* and cannot be in advance controlled or limited by the action of the state in any department of its government."

In *American Express Co. vs. Iowa,* 196 U. S., 133; 49 L. Ed. 417 (1905), Mr. Justice White again says:

> "Those cases (i. e. *Vance vs. Vandercook Co., etc.*) rested upon the broad principle of the freedom of commerce between the states, and of the right of a citizen of one state to freely contract to receive merchandise from another state, *and of the equal right of the citizen of a state to contract to send merchandise into other states.*"

A similar statement of the law was made by the late Justice Lurton in the recent case of *Louisville & Nashville R. R. Co. vs. Cook Brewing Co.,* 223 U. S., 70; 56 L. Ed. 355 (1912).

Both the history of the law leading up to the passage of the Wilson Act and the decisions which construe it show that the sole purpose and effect of the Act were to render the importer's right of resale within the state —an incidental right—subject to the law of that state, so far as intoxicating liquor was concerned. The fundamental right of shipment of any "recognized and legitimate subject of interstate commerce" from one state to another was not in any wise affected by the Act, and that right still exists free from the intrusion of the police power of the state until *after* delivery to the consignee. See also *Adams Express Co. vs. Kentucky,* 214 U. S., 218; 53 L. Ed. 972 (1909), *infra,* page 32.

The principle, which is so plainly and forcibly enunciated in the foregoing cases, is decisive of our case, and would certainly have resulted in a reversal of the conviction, if the Superior Court of Pennsylvania had not been misled by the case of *Delamater vs. South Dakota, infra,* which we will now consider.

B. The case of Delamater vs. South Dakota is not in point.

The Superior Court of Pennsylvania, in its effort to uphold the police power of the state as against the paramount authority of the nation, where interstate commerce is involved, were mistakenly influenced by the case of *Delamater vs. South Dakota,* 205 U. S., 93; 51 L. Ed. 724 (1906). In that case it was held that a statute of South Dakota which regulated the business of soliciting orders for liquor within its borders was constitutional as applied to a solicitation of orders for the purchase of liquor situate in and owned by a citizen of another state (Fuller, C. J. dissenting).

The statute in that case was entirely different from the Pennsylvania statute under consideration. The section of the South Dakota statute required and imposed a license as follows:

> "Section 2834. * * *
>
> "Upon the business of selling or offering for sale any of the above mentioned liquors at retail by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons, $20 per annum. Said license to be paid in each county

in which said traveling salesman does business, in accordance with the provisions of Section 2836."

(A subsequent section made the violation of this law a misdemeanor punishable as provided.)

The above statute was exclusively aimed at "the *business of soliciting* proposals for the purchase of liquor," as was said by Mr. Justice White in writing the majority opinion, and is vastly different from the Pennsylvania statute which punishes only a completed sale involving a delivery or tender of the goods. The decision in the *Delamater* case is based squarely upon the ground that the acts regulated by the statute must necessarily be performed *wholly within the state*, and therefore come within the spirit of the Wilson Act. The right to solicit orders within the state is placed upon the same plane as the right to resell therein in the original package, both because such acts must necessarily be performed within the state, and because they are but incidents to the fundamental right to ship a legitimate article of commerce into another state.

The Pennsylvania Superior Court, as already pointed out, does not for a moment put our statute in the same class with the statute of South Dakota as one regulating the taking of the order, but applies the doctrine of the *Delamater* case to the "execution of the contract." Their reasoning is as follows (Record, page 46):

"The authority of the state to thus regulate an incident preliminary to the introduction of the liquor within the state, is based upon its power to regulate the traffic. If it may regulate the solicitation of orders it may also regulate the acceptance of orders and the making of contracts within the

state. This defendant entered into a contract, in Pennsylvania, *the execution of which* necessarily involved a violation of the law of the state, and he executed that contract according to its terms."

Thus, starting from the proposition that the state may regulate the solicitation of orders and the making of executory contracts within the state, the Pennsylvania court reaches the very unwarranted conclusion that it may also regulate the performance of such a contract, entirely ignoring the fact that this involved a shipment and transportation of the liquor from another state.

The difference between *Delamater vs. South Dakota* and the case at bar is readily apparent. Under the decision in that case a state may regulate the business of soliciting orders within its boundaries. But it does not follow that a state may also regulate and punish a sale, the essential ingredient of which is a transporting of liquor from one state into another. The reasons which allow a control of acts which take place wholly within the boundaries of the state do not apply where the act is one of interstate commerce, i. e., a carrying of liquor from one state to another for the purpose of delivery to the purchaser.

To give as wide a scope to the doctrine of *Delamater vs. South Dakota*, in construing the Wilson Act, as has apparently been done by the Pennsylvania court, would be to contravene the Constitution of the United States, for the act was upheld in *Wilkerson vs. Rahrer*, 140 U. S., 545; 35 L. Ed. 572 (1890), and later in the *Rhodes* case, *supra*, upon the ground that it merely allowed the police power of the states to operate upon a shipment *after* the delivery within the state was complete.

C. The State of Pennsylvania, not having chosen to avail itself of the right to regulate the taking of orders for liquor within its boundaries, cannot be heard to complain of so-called evasions.

The lower court has raised the objection that, if the transaction in question were not held to be within the reach of the police power of Pennsylvania, then evasions of the law would be easy. But the police power of a state cannot be allowed to encroach upon the Federal domain, regardless of the manner in which the existence of the latter may weaken the power of the state. "In case of conflict between the powers claimed by the state and those which belong exclusively to Congress, the former must yield." *Adams Express Co. vs. Kentucky,* 214 U. S., 218; 53 L. Ed. 972 (1909).

All the cases cited by us, wherein the laws of the various states have been held inapplicable to interstate transactions might be called "evasions" of the state law. But the question of what comes within the shield of the United States Constitution is not to be determined by such considerations as the distance covered by an interstate shipment, or the proximity of the shipper's residence to the border of the state into which the shipment is destined. In *Kansas City Breweries Co. vs. Trickett,* 195 Fed., 840 (1907), the officials of the State of Kansas were restrained from interfering with the delivery of liquor to residents of Kansas City, Kansas, which had been sold by plaintiff whose place of business was in Kansas City, Missouri, the liquor being carried across the river in plaintiff's wagons. Being transactions in interstate commerce they were held to be not within the control of the prohibition laws of Kansas.

So also in a Georgia case (the decision of which was concurred in by Mr. Justice Lamar, who was then sitting in the Supreme Court of that state), it was held that a company carrying on a liquor business in Tennessee, and which forwarded circulars through the mails to residents of Georgia soliciting orders for liquor, could not be convicted under a Georgia statute prohibiting the solicitation of such orders within certain counties. *R. M. Rose Co. vs. State,* 133 Ga., 353; 65 S. E. 770 (1909). The free use of the mails in the negotiation of interstate trade was upheld, and on that ground the court distinguished the case from *Delamater vs. South Dakota, supra.*

It has been held in at least one case that, where the commerce clause of the Federal constitution is invoked as a protection to traffic in intoxicating liquor the courts are not precluded from inquiring into the question of whether the transactions involved constitute legitimate interstate commerce, or are merely colorable and intended to defeat the laws of the state. *State vs. Kirmeyer,* 128 Pac., 1114 (Kansas, 1913). But no such question was raised in our case. It was admitted that plaintiff in error had been a *bona fide* resident of Lowellville, Ohio, for fifteen years previous to the time in question, and we are not concerned with possible methods of evading the laws of Pennsylvania.

The point of paramount importance is that the laws of Pennsylvania as construed by its courts do not prohibit, or in any manner regulate, the taking of orders or the making of executory contracts for the sale of liquor. If the state of Pennsylvania wishes to make "evasions" of the law less easy, let her follow

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the lead of South Dakota and many other states,* and assert the right which, in the *Delamater* case, she has been held to possess. *As long as the state has not chosen to avail itself of the right to control the preliminary acts leading to a sale, which take place only within its borders, it cannot be allowed to control the consummation of those acts, which involves interstate commerce in its "fundamental aspect."*

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*That a number of states have passed statutes similar to the South Dakota law for the purpose of regulating the solicitation or taking of orders within the state is shown by the following cases which follow the doctrine of Delamater vs. South Dakota: Ex parte Anixter, 134 Pac., 193 (Colo., 1913) (statute regulating solicitation of orders within the state for the purchase of liquors outside the state); Kirkpatrick vs. State, 138 Ga., 794; 76 S. E., 53 (1913) (statute prohibiting agents of non-residents engaged in interstate commerce from soliciting orders in the state for the sale of intoxicating liquors); Crigler vs. Shepler, 101 Pac., 619 (Kan., 1909) (statute prohibiting the taking or receiving of orders for intoxicating liquors from any person in the state); State vs. Bass Publishing Company, 104 Me., 288 (1908) (statute prohibiting an inhabitant of another state making a contract for, or soliciting orders for, the sale of intoxicating liquors); State vs. State Capital Company, 103 Pac., 1021 (Okla., 1909) (statute prohibiting the advertising within the state of intoxicating liquors which are sold or kept for sale outside the state); State vs. Miller, 66 W. Va., 436; 66 S. E., 522 (1909) (statute regulating the soliciting and receiving orders for intoxicating liquor within the state).

Point III.

Neither the transfer of title to the liquor upon delivery in Pennsylvania, nor the instrumentality by which the delivery was accomplished, are factors sufficient to bring an interstate transaction within the control of the state.

The Superior Court of Pennsylvania, basing their reasoning upon the cases in Pennsylvania relating to sales of liquor in *intrastate* commerce, has held that, inasmuch as title did not pass until delivery to the purchaser in Pennsylvania, the transaction consisted of a sale of liquor in violation of the law. Their exact language is as follows (Record, page 46):

> "The decisions involving the rights of common carriers, of inter-state commerce, above referred to, have no application to this case. This defendant never parted with the actual possession of his property, it continued in his personal control down until the moment he delivered it to the purchasers in Pennsylvania, in violation of the law of the state. There was here no bailment for purposes of transportation, no carrier intervened between seller and purchaser, there was no consignee. The liquors were not only the property of the defendant, but they were in his actual possession down until the moment he delivered them to the purchasers, in Pennsylvania, and thus completed the sale."

The reasoning of the Pennsylvania court necessarily implies two propositions: (1) That it was the

passage of title from seller to purchaser in Pennsylvania which finally stamped the transaction as a sale contrary to the Pennsylvania law; (2) that our case is to be distinguished from those cases in which delivery is made by common carrier by reason of the fact that delivery was made by the seller in his own wagon so as to render plaintiff in error amenable to the state laws in spite of the interstate transportation. We will consider these propositions separately:

A. The fact that title did not pass until delivery to the purchaser in Pennsylvania is insufficient to bring the transaction within the operation of the state law.

We have already seen that the important question under Pennsylvania law is the *place* where title has passed to the purchaser, the sole criterion of guilt being whether or not title passed at the seller's place of business. We may therefore be met with the argument that, title being retained by the seller until delivery, the state may therefore control the passage of title within its borders. In other words, that, although the state may not prohibit the delivery of liquor within its borders where title thereto has vested outside the state in the person ordering the same (such a transaction here being valid under Ohio Law), yet the state may prohibit such delivery where title passes within the state upon the act of making delivery. This argument, however, is unsound, and has been definitely repudiated by previous decisions in this court. *American Express Co. vs. Iowa,* 196 U. S., 133; 49 L. Ed. 417 (1905); *Caldwell vs. North Carolina,* 187 U. S., 622; 47 L. Ed. 336 (1902); *Norfolk & Western R. R. Co. vs. Sims,* 191 U. S., 441; 48 L. Ed. 254 (1903).

In *American Express Co. vs. Iowa* (*supra*) certain intoxicating liquors had been delivered to the Express Company at Rock Island, Illinois, whence they were to be carried to Tama, Iowa, where they were to be delivered to the consignees. The shipment was C. O. D., and upon arrival at Tama the liquors were seized while still in the possession of the Express Company and their destruction ordered on the ground that they were being kept by defendants to be sold in violation of the Iowa law. The statute in question prohibited any person by himself or agent, to manufacture, sell, exchange, etc., or *keep for sale* any intoxicating liquor, or to be in any way concerned in owning or keeping any liquor with intent to violate any provision of the law. The Supreme Court of Iowa held (118 Ia. 447) that the only question was: "whether the delivery of these packages to the consignees would have constituted sales of liquor at Tama, * * * or whether the sales were made at Rock Island, Illinois, and the liquors were in the possession of defendant company merely for transportation and delivery to the consignees in pursuance of such completed sales." The Iowa court proceeded to hold that, under the law of Iowa, the title to a C. O. D. shipment did not pass until delivery; that it necessarily followed that the express company was the agent of the seller, and engaged in selling liquor or keeping liquor for sale in violation of the statute.

The decision was reversed by the United States Supreme Court on the ground that it was immaterial whether title passed upon delivery or not, and that the mere passage of title within the state could never be sufficient reason for removing the transaction from the protection of the interstate commerce clause. Mr. Justice White in writing the opinion says:

> "Coming to test the ruling of the court below by the settled construction of the commerce clause

of the Constitution, expounded in the cases just reviewed, the error of its conclusion is manifest. Those cases rested upon the broad principle of the freedom of commerce between the states, and of the right of a citizen of one state to freely contract to receive merchandise from another state, and of the equal right of the citizen of a state to contract to send merchandise into other states. * * *

"To sustain, therefore, the ruling of the court below would require us to decide that * * *, although, under the interstate commerce clause, a citizen in one state had a right to have merchandise consigned from another state delivered to him in the state to which shipment was made, yet that such right was so illusory that it only obtained in cases where, in a legal sense, the merchandise contracted for had been delivered to the consignee at the time and place of shipment."

This case was followed in the later case of *Adams Express Co. vs. Kentucky*, 206 U. S., 129; 51 L. Ed. 987 (1906).

B. It is immaterial that the liquor was transported from Ohio to Pennsylvania in the seller's own wagon instead of by common carrier.

Although delivery of the liquor in our case was made in the seller's wagon, it was not claimed or suggested that there was any hawking or peddling thereof. At the time the order was given the goods were situated in the seller's store in Ohio, and they were subsequently shipped, in pursuance of that order, direct to the purchaser in Pennsylvania. The testimony of plaintiff in

error and another witness was uncontradicted that, in making shipments, each package was wrapped separately and marked with the name and address of the purchaser before it was put into the wagon (Record, pages 15 and 19). The fact that the contract had been previously entered into and that the goods had a fixed destination in another state, gave the shipment its undoubted character of interstate. As was said in the case of *The Daniel Ball,* 77 U. S., 557, 565; 1 L. Ed. 999, 1002:

> "Whenever a commodity has begun to move, as an article of trade, from one state to another, commerce in that commodity, between the states has commenced."

The transaction in our case, involving as it did the transportation of goods from another state, constituted interstate commerce in its purest and most elementary form. *Hopkins vs. United States,* 171 U. S., 578; 43 L. Ed. 290 (1898); *International Textbook Co. vs. Pigg,* 217 U. S., 91; 54 L. Ed. 678 (1909); *Crenshaw vs. Arkansas,* 227 U. S., 389; 57 L. Ed. 565 (1913). The fact that shipment was made in the seller's own wagon instead of by common carrier only simplifies the transaction and does not in the least detract from the interstate character.

If all circumstances surrounding the transaction in question remained the same, with the single variation that the liquor was transported from Ohio to Pennsylvania by common carrier, would plaintiff in error have been guilty of a crime? In other words, if the original agreement had been the same and had stipulated for a delivery to the purchaser at her residence in Pennsylvania, so that the carrier was the agent of the seller and not of the buyer, no title passing until actual delivery to the purchaser, could plaintiff in error nevertheless

have been held guilty as charged? The great emphasis laid by the Superior Court of Pennsylvania in the langauge above quoted (page 27, *supra*) upon the fact that our case is not one involving transportation by common carrier clearly shows that their answer to the above question would have been in the negative.

There can be no doubt that the seller could not be held for violating the Pennsylvania statute in such a case. The authorities already cited (pages 11-15, *supra*) show conclusively that the delivery of liquor by common carrier in interstate commerce is wholly free from state regulation. In *Adams Express Co. vs. Kentucky,* 214 U. S., 218; 53 L. Ed. 972 (1909), it is held that a statute of the latter state, making criminal the act of knowingly furnishing intoxicating liquor to an inebriate, could not constitutionally be applied to an interstate transportation terminating in a delivery of the liquor in Kentucky. (This case, it should be noted, is exactly contra to the decision in *Commonwealth vs. Zelt,* 138 Pa., 615). These cases all rest upon the ground that the police power of the state cannot attach until after delivery to the consignee, and clearly show that when the delivery of liquor is an integral part of an interstate shipment by common carrier it cannot be regulated or interfered with by the state.

The question at issue is the legal effect of executing a contract by causing transportation of the article contracted for from one state to another. If the *means employed* in accomplishing the transportation is to be the determining factor the whole question would be reduced to an absurdity. Authorities however are not wanting to show that this is not the case: In *Paul vs. Virginia,* 8 Wall., 168; 19 L. Ed., 357 (1869) it is said that "the instrumentalities by which commerce may

be carried on" is an immaterial matter. In *Caldwell vs. North Carolina,* 187 U. S., 622; 47 L. Ed., 336 (1902), where it was held that the retention of title and possession by a non-resident seller until delivery of the goods in North Carolina did not destroy the interstate character of the shipment so as to render it subject to a license tax of that state, it was said per Shiras, J.:

> "It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. *The same could be said if the vendor himself, or by personal agent, had carried and delivered the goods to the purchaser.* That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate."

So also in *Commonwealth vs. Hess,* 148 Pa., 98 (1892) the court holds that a liquor dealer licensed in Philadelphia county has the right to make delivery of liquor to a purchaser in an adjoining county in the seller's own wagon, the orders having been received in Philadelphia county. The court said:

> "If we sustain the court below in this case, we are brought face to face with this proposition: that if a wholesale dealer in liquor receives an order from a customer in an adjoining county, and in pursuance of such order delivers the liquor to a common carrier for transportation, he is a law-abiding citizen; whereas if he delivers that liquor in his own wagon, in the usual course of business,

he is a criminal, and liable to both fine and imprisonment. If this be the law, it is certainly not the 'perfection of reason.' On the contrary, it is the climax of absurdity, and cannot fail to shock the common sense of every business man in the community."

It is important to note that the court in this case are careful to hold that title to the liquor passed in Philadelphia county, as otherwise it would have been a sale in the adjoining county contrary to law, in spite of the fact that the orders were received at the seller's place of business.

Unless we hold as absolutely immaterial the agency by which the interstate transportation of liquor is accomplished, we will do the greatest injustice to small dealers by discriminating in favor of the large. It is the small dealer, like plaintiff in error, who, having customers only within a short radius, seeks to use his own wagon for delivery and finds himself convicted of a crime, while another man, doing a similar business on a larger scale, and availing himself of the facilities offered by a common carrier, is held to be law-abiding.

We submit that plaintiff in error has been convicted under a statute of Pennsylvania, which, in its application to the admitted facts, punishes an act of interstate commerce, and that the judgment herein rendered must, therefore, be reversed.

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Office Supreme Court, U. S.
FILED
JAN 16 1915
JAMES D. MAHER
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914
NO. 193

TONY ROSSI, Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,

Defendant in Error.

In Error to the Superior Court of the State of Pennsylvania

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

In Brief.

Plaintiff in error was convicted in the Court of Quarter Sessions of Lawrence County, State of Pennsylvania, of the crime of selling liquor without a license contrary to the Pennsylvania liquor law. The following facts were proven and are admitted to have constituted the alleged criminal transaction:

1. An order for liquor taken in Lawrence County, Pennsylvania, by plaintiff in error, a citizen of the adjoining County of Mahoning in the State of Ohio.

2. A delivery of the liquor on a subsequent day in pursuance of the order, delivery being made direct from the seller's store in Ohio by the seller's agent in seller's own wagon to the purchaser in Pennsylvania.

3. Credit was extended the purchaser and the purchase price was later collected by the seller at the home of the purchaser in Lawrence County, Pennsylvania.

The single question presented is whether these acts (1) constitute a violation of the Pennsylvania liquor law, or (2),come within the protection of the interstate commerce clause of the United States Constitution.

ARGUMENT.

The facts as proven by the Commonwealth and admitted by the plaintiff in error in his argument (page 8), are, that the order for liquor was taken by the plaintiff in error in the State of Pennsylvania, and that subsequently the order was filled by delivery of the liquors from the State of Ohio into the State of Pennsylvania in the wagon of the plaintiff in error under the control of the driver, who was the agent and employee of the plaintiff in error. Subsequently the plaintiff in error collected the price of the liquors in Pennsylvania.

Under these facts the defendant in error contends that the plaintiff in error was guilty of the crime of selling and offering for sale, liquor without a license in Pennsylvania, and that the judgment herein rendered should be affirmed.

Point I.

Section 15 of the Statute of Pennsylvania, commonly called the Brooks Law, being the act of May 13, 1887, P. L. 108, 113, applies in the case at bar as the sale took place in Pennsylvania.

The Pennsylvania Statute of May 13,1887, P. L. 108, 113, under which plaintiff in error was convicted, is entitled, "An Act to Restrain and Regulate the Sale of vinous, spirituous, malt or brewed liquors or any admixture thereof", etc.

Section 15 of said Act is as follows:

> "Any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquors or any admixture thereof, without a license, shall be sentenced to pay a fine of not less than five hundred dollars or more than five thousand dollars and

undergo an imprisonment in the county jail of not less than three months nor more than twelve months."

The plaintiff in error visited the homes of residents of Lawrence County, Pennsylvania, soliciting, receiving and accepting orders for liquors to be delivered by him to the residences of the purchasers in Pennsylvania. The orders thus given and accepted in Lawrence County, Pennsylvania, constitutes an executory contract.

(See opinion of Superior Court record page 43.)

The statute provides against the selling or offering for sale of vinous, spirituous, malt and brewed liquors or admixtures thereof, and regulates and restrains the same, but does not prohibit.

The Pennsylvania cases hold as in Commonwealth vs. Guinzburg, 46 Penna. Super. Ct. 488, (1911), where Justice Henderson says on page 493:

"The right of the defendant to sell his merchandise is limited by his license to his place of business."

"He is not forbidden, however, to sell to persons residing without the county, if the sales in fact take place at his store, and he may sell on orders received in the regular course of business and may send the liquor by public carrier or by his own wagon to the purchasers."

"Where, however, the sales are made through a solicitor working in a county other than that for which the dealer is licensed, who takes orders which are subsequently filled, on an agreement as part of the contract of sale, that the liquor bought is to be delivered to the purchaser at his residence or place of business

it does not follow as a conclusion of law that the mere setting apart of a package or quantity of liquor, corresponding with the amount of the buyer's order in the store of the vendor, constitutes a sale and delivery at the latter place."

The Court reviews the decisions in Pennsylvania and says:

"What is the contract is a question for the jury, unless in writing and unambiguous."

Commonwealth vs. Guinzburg, 46 Pa.Super. Ct. 488, (1911),

Commonwealth vs. Holstine, 132 Pa. 357, (1890),

Commonwealth vs. Hess, 148 Pa. 98, (1892),

Commonwealth vs. Guja, 28 Super. Ct. 58, (1905).

The jury in the case at bar found by their verdict that the contract was made and completed in the State of Pennsylvania.

From the foregoing decisions it will be seen that the sales must be made in the county where the defendant holds a license and *in the regular course of business.*

The plaintiff in error had no license to sell liquors in Lawrence County, Pennsylvania, and the orders were not taken in the regular course of business; therefore it was a violation of the Act of May 13, 1887, P. L. 108, 113, section 15.

As to the sale being in Pennsylvania, your attention is respectfully called to a part of the opinion of the Pennsylvania Superior Court in the case at bar, record page 43, where Justice Porter says:

"The executory contracts for the sales of

liquors involved in this case, were made in the State of Pennsylvania and those contracts provided for the delivery of the liquors by the defendant at the residences of the purchasers, in the State of Pennsylvania. A sale really consists of two separate and distinct elements; first, a contract of sale, which is completed when the offer is made and accepted, and second, a delivery of the property which may precede, be accompanied by, or follow the payment of the price, as may have been agreed upon by the parties. The sales in this case appear to have been made upon credit, the defendant calling at the residences of his customers, in Pennsylvania, upon the pay-day following the delivery of the goods and there receiving payment. There was no controversy in the Court below as to the manner in which the defendant complied with his agreement to deliver the liquors at the residences of his customers. He had a store in the State of Ohio and he there loaded the goods upon his own wagon and, either by himself or his employee, drove across the state line and delivered the goods to the purchasers at their residences in Pennsylvania, as by his contract he had undertaken to do. *The contract was made in Lawrence county, they were to be there executed, and the goods were delivered, as by contract required, in Lawrence county, Pennsylvania. These facts stamp the transactions as sales in the County of Lawrence, State of Pennsylvania:*"

Commonwealth vs. Holstine, 132 Pa. 357,

Commonwealth vs. Guinzburg, 46 Pa. Super. Ct. 488,

Norfolk & Western Ry. Co. vs. Sims, 191, U. S. 441, 48, L. Ed. 254, (1903).

Point II.

The Statute of Pennsylvania of May 13, 1887, P. L. 108, 113, was enacted in the exercise of the police powers of the Commonwealth of Pennsylvania.

Were the sales made by the plaintiff in error exempt from the police power of the State of Pennsylvania, because of the commerce clause of the Constitution of the United States, notwithstanding the provisions of the Wilson Act? The defendant in error maintains that the Wilson Act does not prevent, but assists the State of Pennsylvania in exercising its rights under the police powers of the State.

In Phillips vs. Mobile, 208 U. S. 478, L. Ed. 52, page 581, (1908) Justice Peckham says:

> "The police powers of a state form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government; all of which may be advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for the regulating of internal commerce of a state, and those which respect turn pike roads, ferrys, are component parts of this mass. The sale of liquors is confessedly a subject of police regulation. Such sale may be absolutely prohibited, or the business may be controlled and regulated by the imposition of license taxes, by which those only who obtain licenses are permitted to engage in it. Taxation is frequently the very best and most practical means of regulating this business. The higher the license, it is sometimes said, the better the regulation, as the high license is to

keep out from the business those who are undesirable, and keep within reasonable limits the number of those who may engage in it."

Vance vs.W. A. Vandercook, 170 U. S. 438, 446, 42 L. Ed. 1100, 1103, (1897.)

Reymann Brew. Co. vs. Brister, 179 U. S. 445, 45 L. Ed. 269, (1900.)

Pabst Brew. Co. vs. Crenshaw, 198 U. S. 17, 25, 49 L. Ed. 925, 928, (1905.)

Delamater. vs. So. Dakota, 205 U. S 93, 51 L. Ed. 724, (1906.)

In Commonwealth vs. Zelt, 138 Pa. 627, (1891), the second assignment of error alleged the Court erred in refusing the following point, viz:

"The State of Pennsylvania nas no power to pass a law making the sale of liquors to a person of known intemperate habits a criminal offense, when such liquor is shipped into this state in original packages, under the provisions of the Constitution and laws of the United States with reference to commerce between the states, until such liquor, so brought in, in such original packages has become, by breaking the bulk or seal, a part of the common property of the State. And any such law now on our statute books has no application to this case."

The Supreme Court of Pennsylvania say, per Chief Justice Paxon:

"The point is based upon the case of Leisy vs. Hardin, 135 U. S. 100, 34 L. Ed. 128, recently decided by the Supreme Court of the United States. It is proper to say that no such question can arise hereafter, as the Act of Congress

passed last summer, commonly called the Wilson Bill, has very properly left the control of the sale of liquor within the states to the laws of the respective states; in other words, it has subjected it to the police power of the states. As this case arose prior to the passage of the Wilson Bill, it must be ruled under the authority of Leisy vs. Hardin."

"The fact that the question cannot arise hereafter is a sufficient reason for not elaborating the point now. It is sufficient to refer to it briefly."

Commonwealth vs. Zelt, 138 Penna. 627.

If the position of the plaintiff in error be correct, then a person could take out a license on or near the Ohio State line, go into any part of the State of Pennsylvania, take verbal orders for any amount of liquors and deliver the same, by person or by wagon or by his agent, collect the purchase price in the State of Pennsylvania, thus making sales in Pennsylvania without any of the police powers of the State being able to regulate, restrain or prohibit him from so doing. This clearly is beyond the power of Congress to regulate interstate commerce.

While Congress has the power to regulate commerce under section 8 of article 1 of the Constitution, the states may validly "affect commerce in two ways."

First, In the exercise of their inherent and inalienable police power.

Second, Under the taxing power.

Munn vs. Ill., 94 U. S. 135, 24 L. Ed. 77, (1877).

Bowman vs. Chicago & Northwestern R. R. Co., 125 U. S. 465, 31 L. Ed. 700, (1888.)

Powell vs. Penna., 127 U. S. 678, 32 L. Ed. 253, (1888.)

Comm. vs. Paul, 170 Pa. 284, (1895),

Plumley vs. Mass., 155 U. S. 461, 39 L. Ed. 223, (1894).

In Commonwealth vs. Paul, 170 Pa. 284, (1895) the discussion by the Supreme Court of Pennsylvania as stated in the opinion by Mr. Justice Williams, on the question of "Original Packages" which is discussed in the following language of the Court:

> "If a pint bottle of whiskey is an original package under the protection of Congress, and can be sold as such regardless of the police legislation of the State, we cannot punish the sale to a minor, to a person of known intemperate habits, to a lunatic, on election days, or on the Sabbath. All power over the traffic for police purposes is gone. And why? Because the power to regulate interstate commerce intended to guard against stoppage along State lines for examination or the collection of custom duties, has been extended by construction, until it is made to reach and protect a retail traffic carried on within any State, if the things sold have come into the retailer's store from a non-resident manufacturer or shipper. If this be a sound construction, then the power of the State to restrict and prohibit an injurious traffic, does not depend upon the deletorious character of the thing sold or the manner in which sales are made or the public or private injury inflicted by the sale, but on the manner in which the

thing sold comes into the possession of the seller. If he makes the article, or buys it of another citizen of the State, he cannot sell it without punishment. If he buys it of a non-resident who sends it to him across the state line, he may sell it with impunity, and the State is powerless to stay his hands or to regulate his sales. A pint of whiskey put up in a flask, if made or bought in this State, cannot be sold without a license granted by the Courts after an examination into the character of the applicant and his business. The same flask of whiskey put up across the border may come as an original package into any community and be sold to any person whether a minor, a drunkard, or a lunatic, under the protection of the Constitution of the United States. We cannot adopt a construction that seems to us so unnatural and unreasonable and that would work such absurd monstrous results."

"A statute which is a legitimate exercise of the police power of the State, for the protection of the health of the people, and for the prevention of fraud, is not inconsistent with the Fourteenth Amendment of the Constitution of the United States. That Amendment was not designed to interfere with the police power by the States."

Powell vs. Penna. 127 U. S. 678, 32 L. Ed. 253, (1888.)

Point III.

The Wilson Act gives the right of the State of Pennsylvania to exercise its police powers on intoxi-

cating liquors transported into the State, remaining therein for use, consumption, sale or storage therein and upon the arrival of such liquor in this State.....

(A)

THE WILSON ACT

The Act of Congress known as the "Wilson Act" approved August 8, 1890, (26 Stat. at Large 313 c. 728)' provides as follows:

> "That all fermented, distilled, and other intoxicating liquors or liquids,transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory exacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory and shall not be exempted therefrom by reason of being introduced therein in original packages or otherwise."

The defendant in error contends that the case of Delamater vs. South Dakota, 205 U. S. 93, 51 L. Ed. 724, is in point insofar as it relates to the regulation of the sale of intoxicating liquors under the police powers of the State.

That the Wilson Act would render subject to the police regulations of a State, not only contracts for the sale of liquor while still in another State, but even the solicitation of orders for such liquor, which would not even contemplate acceptance within the State, was decided in Delamater vs. South Dakota, "supra" in which case Justice White says:

> "That Act, as we have seen, manifested the conviction of Congress that control by the States over the traffic of dealing in liquor within their borders of such importance that it was wise to adopt a special regulation of interstate commerce on the subject. When, then, for the carrying out of this purpose, a regulation expressly provided that intoxicating liquors coming into a State should be as completely under the control of a State as if the liquor had been manufactured therein,it would be, we think, a disregard of the purposes of Congress to hold that the owner of intoxicating liquors in one state can, by virtue of the commerce clause, go himself or send his agent into such other State, there in defiance of the law of such State, carry on the business of soliciting proposals for the purchase of intoxicating liquors."

In the case at bar the defendant in error contends that the plaintiff in error made the sale or that which had the elements of a sale, and said sale being complete in the State of Pennsylvania, that he was, therefore, liable under the Act of Assembly relating to the police powers of the State of Pennsylvania.

In distinguishing this case from those in which goods have been in the hands of a common carrier in interstate shipment, Justice White says:

> "The rulings in the previous cases to the effect that, under the Wilson Act, state authority did not extend over liquor shipped from one state into another until arrival and delivery to the consignee at the point of destination, were but a recognition of the fact that Congress did not intend, in adopting the Wilson Act, even if it lawfully could have done so, to authorize one State to exert its authority in another State by

preventing the delivery of liquor embraced by transactions made in such other State. The proposition here relied on is widely different, since it is that, despite the Wilson Act, the State of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting proposals for the purchase of liquors, because the proposals related to liquors situated in another State. But the business of soliciting proposals in South Dakota was one which that State had a right to regulate, wholly irrespective of when or where it was contemplated, the proposals would be accepted or whence the liquor which they embraced was to be shipped.

Delamater vs. So. Dakota, 205 U. S. *Supra.*

In the opinion of the Superior Court by Justice Porter, (See record page 46) the Court says:

"It being thus established that, by the Wilson Act, a mere solicitation within the State of orders for liquors, located outside the State, is rendered subject to regulation by the police power of the State, it necessarily follows that the making of a contract, by the acceptance of orders, within the State is also subject to the exercise of the police power. The solicitation of an order is a mere preliminary to the contract. The authority of the State to thus regulate an incident preliminary to the introduction of the liquor within the State, is based upon its power to regulate the traffic. If it may regulate the solicitation of orders it may also regulate the acceptance of orders and the making of contracts within the State. This defendant entered into a contract, in Pennsylvania, the execution of

which necessarily involved a violation of the law of the State, and he executed that contract according to its terms. The decisions involving the rights of common carriers of interstate commerce, above referred to, have no application to this case. This defendant never parted with the actual possession of his property, it continued in his personal control down until the moment he delivered it to the purchasers in Pennsylvania, in violation of the law of the State. There was here no bailment for the purposes of transportation, no carrier intervened between seller and purchaser, there was no consignee."

"The soliciting is a part of the sale."

Lang vs. Lynch, 4 L. R. A. 831, 38 Fed. Rep. 489,

Brown vs. Wieland, 116 Iowa, 711, 61 L. R. A.418.

We would respectfully call, in support of our contention, your attention to the entire opinion of the Superior Court of Pennsylvania (Record Pgs. 42-46), which to our mind covers the question at length.

From a perusal of the cases cited in the brief of the plaintiff in error, we contend that the same are not in point with the case at bar and can easily be distinguished for the reason that the sale as shown by the testimony in the case (Record Pgs. 7 to 23 inclusive) took place in the State of Pennsylvania, which was a violation of the Pennsylvania Statute of May 13, 1887, P. L. 108, 113, and does not come under the protection of the commerce clause of the United States relating to interstate commerce taken in connection with the Wilson Act.

In conclusion, taking into consideration the admitted facts on the part of the plaintiff in error and the verdict of the jury, which finding constituted a sale in the State of Pennsylvania, which sale was in violation of the police powers of the state, it is respectfully submitted that the judgment of the Superior Court of Pennsylvania in this case should be affirmed.

CLYDE V. AILEY, District Attorney
THOMAS W. DICKEY,

Attorneys for Defendant in Error.

ROSSI *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

No. 193. Argued March 11, 1915.—Decided June 1, 1915.

A State may not punish one who sells and delivers liquor in original packages within the State pursuant to orders solicited within the State but delivered from without the State, under the circumstances of this case which arose prior to the Webb-Kenyon Law.

The transportation of intoxicating liquor, as of other merchandise, from State to State is interstate commerce and cannot be interfered with by the States except as permitted by Congress.

The Wilson Act of 1890, while placing liquor on arrival at destination under the law of the State, does not subject liquor transported in interstate commerce to state regulation until after arrival at destination and delivery to the consignee or purchaser.

Under the Wilson Act the power of the State does not extend to a shipment of liquor prior to delivery to the purchaser because it was transmitted in pursuance of an order previously obtained within the State, where, as in Pennsylvania, there is no statute prohibiting the solicitation and taking of such orders for liquor without a license. *Delamater* v. *South Dakota*, 205 U. S. 93, distinguished.

53 Pa. Sup. Ct. 210, reversed.

THE facts, which involve the validity under the commerce clause of the Federal Constitution of a conviction for selling liquor without a state license, and the construction of the Wilson Act of 1890, are stated in the opinion.

Mr. H. C. McClintock for plaintiff in error.

Mr. Thomas W. Dickey, with whom *Mr. Clyde V. Ailey* was on the brief, for defendant in error:

Section 15 of the Statute of Pennsylvania, commonly called the Brooks Law, applies as the sale took place in Pennsylvania.

The sale must be made in the county where the defendant holds a license and in the regular course of business.

The plaintiff in error had no license to sell liquors in Lawrence County, Pennsylvania, and the orders were not taken in the regular course of business.

The contract was made in Lawrence County, they were to be there executed, and the goods were delivered, as by contract required, in Lawrence County, Pennsylvania. These facts stamp the transactions as sales in the County of Lawrence, State of Pennsylvania. *Commonwealth* v. *Holstine*, 132 Pa. St. 357; *Commonwealth* v. *Guinzburg*, 46 Pa. Sup. Ct. 488; *Norfolk & Western Ry. Co.* v. *Sims*, 191 U. S. 441.

The Brooks Act was enacted in the exercise of the police powers of the Commonwealth of Pennsylvania.

The sales made by the plaintiff in error were not exempt from the police power of the State of Pennsylvania, because of the commerce clause of the Constitution of the United States, and notwithstanding the provisions of the Wilson Act. The Wilson Act does not prevent, but assists the State of Pennsylvania in exercising its rights under the police powers of the State. *Phillips* v. *Mobile*, 208 U. S. 478; *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 446;

Reymann Brew. Co. v. *Brister*, 179 U. S. 445; *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17, 25; *Delamater* v. *South Dakota*, 205 U. S. 93; *Commonwealth* v. *Zelt*, 138 Pa. St. 627.

If plaintiff in error be correct, a person may take out a license on or near the Ohio state line, go into any part of the State of Pennsylvania, take verbal orders for any amount of liquors and deliver the same, by person or by wagon or by his agent, collect the purchase price in the State of Pennsylvania, thus making sales in Pennsylvania without any of the police powers of the State being able to regulate, restrain or prohibit him from so doing. This clearly is beyond the power of Congress to regulate interstate commerce.

While Congress has the power to regulate commerce the States may validly affect commerce in the exercise of their inherent and inalienable police power and under the taxing power. *Munn* v. *Illinois*, 94 U. S. 135; *Bowman* v. *Chicago & N. W. R. R.*, 125 U. S. 465; *Powell* v. *Pennsylvania*, 127 U. S. 678; *Commonwealth* v. *Paul*, 170 Pa. St. 284; *Plumley* v. *Massachusetts*, 155 U. S. 461.

The Wilson Act gives the right to the State of Pennsylvania to exercise its police powers on intoxicating liquors transported into the State, remaining therein for use, consumption, sale or storage therein and upon the arrival of such liquor in this State.

Soliciting is a part of the sale. *Lang* v. *Lynch*, 38 Fed. Rep. 489; *Brown* v. *Wieland*, 116 Iowa, 711; *Delamater* v. *South Dakota*, 205 U. S. 93.

Mr. Justice Pitney delivered the opinion of the court.

Plaintiff in error was convicted in the Court of Quarter Sessions of Lawrence County, in the State of Pennsylvania, of the crime of selling intoxicating liquors in that county without a license, contrary to § 15 of an act of May 13,

1887 (P. L. p. 113), which declares: "Any person who shall hereafter be convicted of selling or offering for sale any vinous, spirituous, malt or brewed liquors, or any admixture thereof, without a license, shall be sentenced," etc. The Superior Court affirmed the conviction (53 Pa. Sup. Ct. 210), the Supreme Court of the State refused an appeal, and this writ of error was allowed.

The facts are these: Plaintiff in error is a liquor dealer having his place of business in the County of Mahoning, in the State of Ohio, which immediately adjoins Lawrence County, Pennsylvania. He had no license to sell in Lawrence County, nor any place of business there, but went into that county and there took an order for liquor, with the understanding that the liquor should be thereafter delivered from his stock in Ohio to the residence of the purchaser in Pennsylvania. He returned to Ohio, there loaded the goods upon his own wagon, and either by himself or his employé drove across the state line and delivered the liquor to the residence of the purchaser pursuant to the contract. Thus the sale was negotiated in Pennsylvania, but contemplated and required for its fulfillment a transaction in interstate commerce, which afterwards took place, with resulting delivery in Pennsylvania.

The charge, as will be observed, was selling, not offering for sale. And it is admitted that by the Pennsylvania decisions the act of taking orders for future delivery is not punishable under the statute cited, or any other, and that it is not the making of an executory contract but the executed sale that is punishable. *Commonwealth* v. *Smith*, 16 Pa. Co. Ct. 644, 646, 647; *Star Brewing Company's License*, 43 Pa. Sup. Ct. 577, 580; *Commonwealth* v. *Guinzburg*, 46 Pa. Sup. Ct. 488, 497; and see *Garbracht* v. *Commonwealth*, 96 Pa. St. 449, 453. And so, in the present case, the Superior Court (53 Pa. Sup. Ct. 220) recognized that it was not the making of the executory contract, but

the execution of it, that involved a violation of the law of the State.

The Federal question presented is whether, under the act of Congress approved August 8, 1890 (c. 728, 26 Stat. 313), known as the Wilson Act, the State of Pennsylvania may punish plaintiff in error for delivering in that State liquors transported in interstate commerce, under the circumstances stated. The case arose before the passage of the act of March 1, 1913 (c. 90, 37 Stat. 699), known as the Webb-Kenyon Act, and the effect of this legislation is therefore not now involved.

As has been recently pointed out in *Kirmeyer* v. *Kansas*, 236 U. S. 568, 572, the transportation of intoxicating liquor, as of other merchandise, from State to State, is interstate commerce, and state legislation which penalizes it or directly interferes with it, otherwise than as permitted by an act of Congress, is in conflict with the commerce clause of the Federal Constitution; and while Congress, in the Wilson Act, declared in substance that liquors transported into any State or remaining therein for use, consumption, etc., shall upon arrival in such State be subject to the operation and effect of its laws enacted in the exercise of the police power, to the same extent and in the same manner as though the liquors had been produced in such State, and shall not be exempt therefrom by reason of being introduced in original packages, this does not subject liquors transported in interstate commerce to state regulation until after their arrival at destination and delivery to consignee or purchaser. *Leisy* v. *Hardin*, 135 U. S. 100, 110; *Rhodes* v. *Iowa*, 170 U. S. 412, 423; *American Express Co.* v. *Iowa*, 196 U. S. 133, 142, 143; *Louis. & Nash. R. R.* v. *Cook Brewing Co.*, 223 U. S. 70, 82.

The Pennsylvania Superior Court deemed that the present case was controlled by *Delamater* v. *South Dakota*, 205 U. S. 93, where a statute imposing an annual license charge upon the business of selling or offering for sale

intoxicating liquors within the State by traveling salesmen soliciting orders was held to be enforceable in view of the Wilson Act, even as applied to the business of soliciting, within the borders of the State, proposals for the purchase of liquors which were to be consummated by the delivery within the State of liquors to be brought from without. That case, however, has no present pertinency, since the prohibition of the Pennsylvania statute is not addressed to the business of soliciting contracts for the purchase of liquor, but to the sale of the liquor itself; and by the terms of the Wilson Act, as previously construed, the control of this subject by the several States is postponed until after the delivery of the liquor within the State.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion.